105

Supreme Court, U.S.
FILED

08-389 SEP 22 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No.

IN THE

# Supreme Court of the United States

ROBERT C. STEINBURG, PETITIONER

*v.*

CHESTERFIELD COUNTY PLANNING COMMISSION;
DANIEL A. GECKER, IN HIS OFFICIAL CAPACITY;
SHERMAN W. LITTON, IN HIS OFFICIAL CAPACITY

*PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FOURTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

JOHN W. WHITEHEAD

DOUGLAS R. MCKUSICK

*The Rutherford Institute*
*1440 Sachem Place*
*Charlottesville, VA 22901*
*(434) 978-3888*

JAMES B. THORSEN
*Counsel of Record*

*James B. Thorsen, P.C.*
*& Associates*
*3810 Augusta Avenue*
*Richmond, VA 23230*
*(804) 359-3000*

*Attorneys for Petitioner*

CURRY & TAYLOR ♦ (202) 393-4141

## QUESTIONS PRESENTED

The court below upheld a ban on "personal attacks" at a local government public meeting, a limited public forum, and upheld the Respondents' termination of the Petitioner's speech and eviction from that meeting after he criticized their treatment of the prior two speakers. In *Cornelius v. NAACP* and other earlier cases, this Court held that such a content-based restriction in a limited or designated public form must be narrowly tailored to serve a compelling state interest. The Court, though, has since stated in dictum that such a restriction on speech in a limited public forum need only be reasonable in light of the purpose served by the forum, most recently in *Good News Club v. Milford Central School*. The circuit courts are in conflict as to which standard to apply. The questions presented are:

1. Whether a content-based restriction on speech in a limited public forum must be narrowly tailored to serve a compelling state interest, especially where a speaker at a public meeting is expressing relevant criticism of a government official concerning the execution of his official duties?

2. Whether the ban on "personal attacks" is facially invalid under the First Amendment as viewpoint discrimination or for vagueness and overbroadness, and invalid as applied in this case, or whether the Respondents personally engaged in viewpoint discrimination?

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

RELEVANT PROVISIONS INVOLVED ..... 1

STATEMENT ..... 3

REASONS FOR GRANTING THE PETITION ..... 13

CONCLUSION ..... 38

APPENDIX

*Court of Appeals for the Fourth Circuit Decision* ..... 1a
*District Court Memorandum Opinion(2/1/2007)* ..... 29a
*District Court Memorandum Opinion(2/1/2007)* ..... 48a
*Order denying Rehearing* ..... 77a

## TABLE OF AUTHORITIES

Page

CASES

BACA V. MORENO VALLEY UNIFIED SCHOOL DISTRICT, 936 F. SUPP. 719 (C.D. CAL. 1996) ..... 16, 17
BACH V. SCHOOL BOARD OF THE CITY OF VIRGINIA BEACH, 139 F.SUPP.2D 738 (E.D. VA. 2001) ..... 10, 12, 16, 28
BALTIMORE SUN CO. V. EHRLICH, 437 F.3D 410 (4TH CIR. 2006) ..... 36, 37
BLANKENSHIP V. MANCHIN, 471 F.3D 523 (4TH CIR. 2006) ..... 37
BOARD OF COUNTY COMMISSIONERS, WABAUNSEE COUNTY, KANSAS V. UMBEHR, 518 U.S. 668 (1996) ..... 36
BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA V. BROWN, 520 U.S. 397 (1997) ..... 32
BROWN V. CITY OF JACKSONVILLE, NO. 3:06-CV-122-J-20MMH, 2006 WL 385085 (M.D. FLA., FEB. 17, 2006) ..... 27
BUCKLEY V. VALEO, 424 U.S. 1 (1976) ..... 15, 26
CHARBONNAGES DE FRANCE V. SMITH, 597 F.2D 406, 414 (4TH CIR. 1979) ..... 32
CHILD EVANGELISM FELLOWSHIP OF S.C. V. ANDERSON SCH. DIST. FIVE, 470 F.3D 1062 (4TH CIR.2006) ..... 11
CITY OF ST. LOUIS V. PRAPOTNIK, 485 U.S. 112 (1988) ..... 34
CORNELIUS V. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, 473 U.S. 788 (1985) ..... *passim*
DIETRICH V. FERGUSON, NO. 00-C-0671-C, 2002 WL 32357102 (W.D. WIS., MAY 29, 2002) ..... 27
EICHENLAUB V. TOWNSHIP OF INDIANA, 385 F.3D 274 (3D CIR. 2004) ..... 17
FEDERAL ELECTION COMMISSION V. WISCONSIN RIGHT TO LIFE, INC., __ U.S. __, 127 S. CT. 2652 (2007) ..... 30
FIRST NATIONAL BANK OF BOSTON V. BELOTTI, 435 U.S. 765 (1978) ..... 28, 29

GOOD NEWS CLUB V. MILFORD CENTRAL SCHOOL, 533 U.S. 98 (2001) ..... *passim*
GRAYNED V. CITY OF ROCKFORD, 408 U.S. 104 (1972) ..... 30
HALL V. MARION SCHOOL DISTRICT NO. 2, 31 F.3D 183 (4TH CIR. 1994) ..... 33, 34
JONES V. HEYMAN, 888 F.3D 1328 (11TH CIR. 1989) ... 17, 25, 27
LAMB'S CHAPEL V. CENTER MORICHES UNION SCHOOL DISTRICT, 508 U.S. 384 (1993) ..... 14, 21, 22
LEVENTHAL V. VISTA UNIFIED SCHOOL DISTRICT, 973 F. SUPP. 951 (S.D. CAL. 1997) ..... 16
MADISON JOINT SCHOOL DISTRICT V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 429 U.S. 167 (1976) ..... 18, 19, 28
MATSUSHITA ELEC. INDUS. CO., LTD. V. ZENITH RADIO CORP., 475 U.S. 574 (1986) ..... 31
MESA V. WHITE, 197 F.3D 1041, 1044-45 (10TH CIR. 1999) ..... 17, 25, 27
METRIC/KVAERNER FAYETTEVILLE V. FEDERAL INSURANCE CO., 403 F.3D 188 (4TH CIR. 2005) ..... 32
MONELL V. NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, 436 U.S. 658 (1978) ..... 32
MONTEIRO V. CITY OF ELIZABETH, 436 F.3D 397 (3D CIR.), CERT. DENIED, __ U.S. __, 127 S. CT. 116 (2006) ..... 17, 27
MOORE V. ASBURY PARK BOARD OF EDUCATION, NO. CIV. A.05-2971-MLC, 2005 WL 2033687 (D. N.J., AUG. 23, 2005) ..... 16
MUSSO V. HOURIGAN, 836 F.2D 736 (2D CIR. 1988) ..... 27, 32, 33, 37
NATIONAL ENDOWMENT FOR THE ARTS V. FINLEY, 524 U.S. 569 (1998) ..... 30
OSBORNE V. LOHR-ROBINETTE, NO. 1:05-0106, 2006 WL 3761597 (S.D. W. VA., DEC. 20, 2006) ..... 27
PERRY EDUCATORS ASSOCIATION V. PERRY LOCAL EDUCATORS ASSOCIATION, 460 U.S. 37 (1983) ..... *passim*
PERRY V. SINDERMANN, 408 U.S. 593 (1972) ..... 37
PICKERING V. BOARD OF EDUCATION, 391 U.S. 563 (1968) ..... 37

PISCOTONNO V. TOWN OF SOMERS, 396 F. SUPP.2D 187 (D. CONN. 2005) ..... 27
POLICE DEPT. OF CHICAGO V. MOSLEY, 408 U.S. 92, 92 S.CT. 2286, 2290, 33 L.ED.2D 212 (1972) ..... 18
POLLER V. COLUMBIA BROADCASTING SYSTEM, INC., 368 U.S. 464 (1962) ..... 32
R.A.V. V. CITY OF ST. PAUL, MINNESOTA, 505 U.S. 377 (1992) ..... 15, 26, 29
ROSENBERGER V. RECTOR AND BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA, 515 U.S. 819 (1995) ..... 14, 22, 23, 24
STEINBURG V. CHESTERFIELD COUNTY PLANNING COMMISSION, 527 F.3D 377 (4TH CIR. 2008) ..... 1
TIMMON V. WOOD, NOS. 5:05-CV-127, 5:06-CV-07, 2008 WL 1808815 (W.D. MICH., APRIL 21, 2008) ..... 27
UNITED STATES V. DIEBOLD, INC., 369 U.S. 654 (1962) ..... 31
WARD V. ROCK AGAINST RACISM, 491 U.S. 781 (1989) ..... 12, 30
WASHINGTON STATE GRANGE V. WASHINGTON STATE REPUBLICAN PARTY, __ U.S. __, 128 S. CT. 1184 (2008) ..... 29
WIDMAR V. VINCENT, 454 U.S. 263 (1981) ..... 14, 19, 24
ZAPACH V. DISMUKE, 134 F. SUPP.2D 682 (E.D. PA. 2001) ..... 27

**STATUTES**

28 U.S.C. § 1254(1) ..... 1
28 U.S.C. § 1331 ..... 3, 10
42 U.S.C. § 1983 ..... 2, 3

**CONSTITUTIONAL PROVISIONS**

1st Amendment ..... 1
14th Amendment ..... 1, 2

**OTHER AUTHORITIES**

Ronnie J. Fischer, *'What's in a Name' An Attempt to Resolve the 'Analytical Ambiguity' of The Designated and Limited Public Fora*, 107 Dick. L. Rev. 639 (Winter 2003) ..... 13

Wilson R. Huhn, *Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 Ind. L. Rev. 801 (Fall 2004) ..... 14

Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 St. John's L. Rev. 107 (Winter 2008) ..... 14

## OPINIONS BELOW

The opinion of the Fourth Circuit is reported in *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377 (4th Cir. 2008). The memorandum opinions of the District Court of the Eastern District of Virginia are unreported.

## JURISDICTION

The Fourth Circuit entered judgment on May 29, 2008 and affirmed the orders of the District Court granting the Respondents summary judgment against the Petitioner and denying the Petitioner's motion to amend the Complaint. The Fourth Circuit denied the Petition for Rehearing En Banc on June 24, 2008. This Court has jurisdiction to review this Petition for Certiorari pursuant to 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS INVOLVED

*First Amendment:*

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

*Fourteenth Amendment, Section One:*

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

> the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*42 U.S.C. § 1983*:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT

### A. Basis for Federal Jurisdiction

Steinburg sued pursuant to 42 U.S.C. § 1983 alleging that the Respondents violated his First Amendment right to free speech, thereby conferring federal question jurisdiction upon the District Court under 28 U.S.C. § 1331.

### B. Background

The Chesterfield County Planning Commission ("the Commission") has a monthly public meeting, and the Commission's Suggested Practices and Procedures prohibited speakers at these public meetings from making "personal attacks."[1]

A developer had filed an application with the Commission to construct homes with front-facing rather than side-facing garages in a Chesterfield County subdivision. This application was on the written agenda for the Commission's October 18, 2005 public meeting, but shortly before the meeting the developer filed a request to defer consideration of its application until the next month.

When the developer's request for a deferral came up at the meeting, which was videotaped (*see* Fourth Circuit Exhibit A), the developer's

---

[1]Except where otherwise noted, the facts cited in this Petition are derived from the Fourth Circuit's opinion and the District Court's Memorandum Opinions, which are attached in the Appendix (*See* Appendix at 1a, 29a, 48a).

representative William Shewmake came to the podium and asked the Commission to defer the application. Chairman Sherman Litton then invited any of the attendees to speak.

The first speaker Nancy Frantel, who had come to the meeting prepared to speak about the application, approached the podium with charts and accompanied by an assistant. Litton stated that the hearing was "just on the deferral." Frantel stated she was for the deferral and then made a six-minute presentation on abandoned mines located under the proposed subdivision. Commissioner Daniel Gecker appeared annoyed, distracted and not otherwise interested during Frantel's speech. At one point he asked her if she lived in the subdivision, and when Frantel replied no, Gecker rolled his eyes, tapped his pen and shook his head (Fourth Circuit Exhibit A; Fourth Circuit Appendix at 86, 127, 130-31). Commission member Wayne Bass then asked Frantel follow-up questions on the mines for an additional two-to-three minutes. Litton indulged Frantel's presentation and Bass' follow-up questions without interruption.

As the second speaker Mike Harton approached the podium carrying more charts, Litton told him that the hearing was only as to the deferral, but Harton proceeded to make his own presentation on the danger of the mineshafts. Gecker interrupted and asked Harton his position on the deferral. Harton quickly mentioned he was in favor and attempted to resume his presentation, but Litton interrupted and stated that he did not want to hear any remarks past the deferral. Harton promised he would soon "shut up" and shortly thereafter concluded his remarks.

Gecker then asked Shewmake to answer a question about the mines. Gecker acknowledged that "this doesn't deal with the deferral, Mr. Chair, but since you have let everybody else speak long past the deferral issue, maybe we can put this one to bed also." Gecker stated that the developer had informed him that it had hired a firm to survey the location of any mines prior to construction, which Shewmake confirmed.

After this exchange, Litton asked "Does anyone else desire to speak?" The Petitioner Robert Steinburg then went to the podium and criticized the Commission members, Gecker specifically, about their ill-mannered behavior during the first two speakers' presentations:[2]

> Good evening, ladies and gentlemen, my name is Bob Steinburg, and I am President of the Old Gun Road Civic Association, which represents 600 homes in the historic Old Gun Road corridor. And uh, we have some, we had our annual picnic here last week, and I can tell you that there is a great deal of concern about this particular project, and uh, these are health and safety concerns that are not only environmental in nature, but you've heard a great deal tonight from the speakers who have stepped up to the

[2]Steinburg was not the only attendee upset with the Commission members' demeanor toward Frantel and Harton. Marlene Durfee observed Gecker's behavior while Frantel and Harton spoke and noted Litton's interruptions of them and also intended to go to the podium to criticize the Commission members, but Steinburg approached the podium and raised the issue first (Fourth Circuit Appendix at 130-32).

bar so far.

Now I, I understand that you're not making a decision as it relates to this particular issue this evening, but I think it is very, very important to apprise you, if you are not already aware, that uh, this is an issue that people-it's a very volatile issue. I've lived in this corridor for thirty years, and I can tell you I haven't seen people this hot about anything like this, ever.

This is a very serious issue. One of the things that troubles me when some of these things are being presented this evening is a lot of bantying [sic] about back and forth by some of you who don't seem to be paying attention, or else are talking about something that perhaps, uh, might not even be related. And I can tell you that perception is reality in the eyes of many. What you are talking about, I have no idea. Mr. Gecker, you in particular, leaning over and saying this, that, and the other thing, but I can tell you from a perception standpoint from someone who is concerned, like myself and the others in this room, it's not very flattering. Believe me.

After being criticized for the way he was conducting his official duties, Gecker immediately interrupted Steinburg and accused him of "abusing the podium":

GECKER: Mr. Steinburg, abusing this podium is not very flattering-

STEINBURG: That is not abusing the podium, sir. That is not abusing the podium. I am telling you what I observed. I am a citizen. I am representing 600 households here at their bequest [sic] tonight, and you will listen to what I am saying, sir.

GECKER: No, sir, you will not talk to me that way. I am not going to listen to what you've got to say on a deferral motion when you come up and speak to something other than the deferral. The Old Gun Road Association-

STEINBURG: That is with regard to the deferral, sir-

GECKER:-that you represent supported the Tarrington rezoning-

STEINBURG: Mr. Gecker, would you please give me the right to speak? Who do you think you are?

LITTON: I'm going to cut you off. I'm Chairman, I can cut-

STEINBURG: Mr. Litton, yes you can, you can do that.

LITTON: And I am. This has gone way past. I've given you the courtesy. This is nothing but a deferral. This has nothing to do with the case. So just please sit down.

STEINBURG: I'm not sitting down. I'm not

done talking yet. Ask Kirk Turner, he knows me. I'm not a wild citizen.

GECKER: Is there-Mr. Turner, is that right?

STEINBURG: Let me speak!

LITTON: I, you know, I've, I've heard enough on this case tonight. I'm going to cut it off . . .

Litton and Steinburg then discussed Litton's reasons for cutting Steinburg off, with Litton stating that Steinburg did not limit his remarks to the deferral, and with Steinburg asking why he had to stop speaking.

Meanwhile, Kirk Turner, the county director of planning serving as secretary of the Commission, had pressed an electronic alarm to summon the police during the exchange between Steinburg and Gecker. Turner felt that Steinburg began speaking to the deferral but that Steinburg's criticism of Gecker had gotten "personal" and that the meeting had gotten "out of control" (Fourth Circuit Appendix at 256, 260). Police officer James Profita entered the room, and Litton asked Profita to make Steinburg sit down. When Profita requested that Steinburg leave the podium Steinburg refused while questioning why, and Profita ultimately arrested Steinburg and cited him for disorderly conduct, a charge which was later dropped.

After Steinburg's eviction, Litton then asked "Is there anyone else who would like to speak to the deferral?" The audience responded with an audible round of nervous laughter, and no one else came forward (Fourth Circuit Exhibit A; Fourth Circuit

Appendix at 94, 119, 132). The Commission members then continued to discuss the mines issue for almost nine more minutes.

In response to public criticism of the Commission's actions toward Steinburg, Gecker later stated in an e-mail on October 27, 2005 that Steinburg had "launched into a personal attack (also prohibited by our rules)." Litton had received a copy of the Suggested Practices and Procedures when he joined the Commission and had read them prior to October 18, 2005 (Fourth Circuit Appendix at 61-62, 416). The Commission rescinded the "personal attacks" ban on April 18, 2006, six days after Steinburg filed suit.

### C. Steinburg's § 1983 Suit and Results Below

Steinburg brought a § 1983 suit against the Commission and Litton and Gecker in their official capacities (sometimes collectively referred to as "the Respondents"), alleging that the Commission's ban of "personal attacks" was unconstitutional and that the Respondents had violated Steinburg's First Amendment rights when they evicted him because of his criticism of the Commission members. Steinburg later moved to amend his Complaint to add Litton and Gecker as individual defendants. Steinburg specifically raised the issue of the proper First Amendment standard of review before the District Court by citing *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800 (1985), in arguing that content-based regulations in a limited public forum must be narrowly drawn to achieve a compelling state interest.

The Respondents filed a Motion for Summary Judgment. The District Court assumed for the purposes of the motion that the "personal attacks" policy was unconstitutional, in accordance with the Eastern District of Virginia's earlier decision in *Bach v. School Board of the City of Virginia Beach*, 139 F.Supp.2d 738 (E.D. Va. 2001), holding a similar ban unconstitutional (Appendix at 46a at n.6). So, the District Court did not address the proper First Amendment standard of review, with regard to the "personal attacks" ban. The District Court also inferred that Gecker had interrupted Steinburg and accused him of "abusing the podium" because of the "personal attacks" ban, since Gecker referred to the ban in his October 27 e-mail. (*Id.* at 43a).

The District Court, though, granted summary judgment to the Commission because it held that it was Litton who terminated Steinburg's speech and that there was insufficient evidence to show that Litton was acting pursuant to the ban. (*Id.* at 43a-44a). The District Court also denied the motion to amend the Complaint to add Litton and Gecker as individual defendants, as being futile. The District Court held that Litton, not Gecker, had terminated Steinburg's speech and that Litton did not engage in viewpoint discrimination when he silenced Steinburg to limit the discussion to the deferral (*Id.* at 64a-72a).

On appeal, Steinburg again specifically raised the issue of the proper First Amendment standard of review by citing *Cornelius* in arguing that content-based regulations in a limited public forum must be narrowly drawn to achieve a compelling state interest. (Opening Brief of the Appellant at 32). The Fourth

Circuit employed the standard of review stated in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), and held that the "personal attacks" ban was constitutionally permissible if it did not discriminate against one's viewpoint and was reasonable in light of the purpose served by the forum:

> In a limited public forum . . . the government still 'must not discriminate against speech on the basis of viewpoint,' and any restriction 'must be reasonable in light of the purpose served by the forum.' *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067-68 (4th Cir.2006) (quoting *Good News Club*, 533 U.S. at 106-07, 121 S.Ct. 2093).
>
> In this case the parties agree that the Commission's public meeting was a 'limited public forum,' and we concur in that assessment. Accordingly, a government entity such as the Commission is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business. But any restriction must not discriminate on the basis of a speaker's viewpoint. *See Good News Club*, 533 U.S. at 106-07, 121 S.Ct. 2093.

(Appendix at 15a).

The Fourth Circuit affirmed the District Court but went further by concluding that the "personal attacks" ban was a constitutionally valid, reasonable content-neutral restriction on the time, place, or

manner of speech in a limited public forum and designed to maintain proper parliamentary decorum, rejecting the holding in *Bach, supra.* (*Id.* at 18a-20a) (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).[3] The Fourth Circuit held that Steinburg had ample alternative channels of communication because he could have presented his criticism without resorting to a "personal attack" (*Id.* at 20a). *See Ward.*

Moreover, the Fourth Circuit also held that the "personal attacks" ban was not unconstitutional as applied because Litton was the one who cut off Steinburg, and there was insufficient evidence that Litton enforced the ban. (Appendix at 21a-23a). The Fourth Circuit also found that Gecker and Litton did not engage in viewpoint discrimination in silencing Steinburg for criticizing them, so the motion to amend to add Gecker and Litton as individual defendants was futile (*Id.* at 23a-28a). Gecker, the Fourth Circuit stated, had merely expressed his disagreement with Steinburg and was not required to listen to his views, and Litton had cut off Steinburg merely to restore order and did not treat Steinburg any differently from the other speakers in attempting to limit the topic to the deferral. (*Id.*).

---

[3]Even though the Commission rescinded the ban on April 18, 2006, the Fourth Circuit addressed the validity of the ban in its opinion, and, as discussed below, since Gecker and Litton implemented this unconstitutional policy of the Commission in cutting off Steinburg's speech, he can hold the Commission liable under § 1983.

## REASONS FOR GRANTING THE PETITION

### A. Introduction – This Case Squarely Presents a Conflict Between the Courts Regarding a Recurring Issue of Great Constitutional Importance.

The Circuit Courts are of different minds, "dazed and confused" as one commentator has stated it, about the nature and scope of the First Amendment limited public forum standard of review. *See* Ronnie J. Fischer, *'What's in a Name' An Attempt to Resolve the 'Analytical Ambiguity' of The Designated and Limited Public Fora*, 107 Dick. L. Rev. 639, 642-43, 657-70 (Winter 2003) (and cases cited therein).[4]

---

[4]As this commentator characterized the conflict:

> In describing the relationship between this designated public forum and limited public fora, courts have variously said: (1) the designated public forum and the limited public forum are interchangeable terms describing the same thing and both receive strict scrutiny review; (2) a limited public forum is a type of designated public forum and both receive strict scrutiny review; (3) a limited public forum is a type of nonpublic forum that receives only rational basis review; (4) a limited public forum can be either a type of designated public forum or a type of nonpublic forum, the former receiving strict scrutiny review and the latter receiving only rational basis review; (5) a limited public forum is a type of designated public forum but the limited public forum receives only rational basis review; and (6) a limited public forum is a type of designated public forum whose standard of review depends on whether the speaker falls inside or outside of the limiting class set by government.

Fischer, *supra*, 107 Dick. L. Rev. at 657-58 (footnotes citing cases omitted).

This inter-circuit conflict stems from the conflicts in the Supreme Court's own jurisprudence over the last three decades on the proper standard of review. *See and compare Widmar v. Vincent*, 454 U.S. 263 (1981); *Perry Educators Association v. Perry Local Educators Association*, 460 U.S. 37 (1983); *Cornelius*; *Lamb's Chapel v. Center Moriches Union School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Board of Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Good News Club*; *see generally* Fischer, *supra*; Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 St. John's L. Rev. 107, 129-30 (Winter 2008); Wilson R. Huhn, *Assessing the Constitutionality of Laws That are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 Ind. L. Rev. 801 (Fall 2004).

This case demonstrates that the *Good News Club* rational basis standard of review is not workable in all limited public forum cases. *Good News Club* concerned a private group's mere access to public facilities, while this case deals with a most basic form of free speech in a democracy: a citizen's right at a public meeting to make relevant criticism of a local government official concerning that official's conduct of his public duties.

The bad fit of the *Good News Club* standard here shows that a content-based restriction of such speech in a limited public forum should be subject to strict scrutiny and that this Court should grant the speaker the greatest amount of freedom of speech possible, short of expression that has traditionally not been entitled to the same presumptive protection under the First Amendment, such as obscenity, "fighting words,"

or defamation. *See, e.g., R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382-86 (1992). Discussion of public issues and debate on the qualifications of public officials have always been "integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

In this case, the Fourth Circuit's restriction of Steinburg's speech chills every citizen's right to express relevant criticism of a government official at a public meeting concerning that official's execution of his public duties, all around the country, every workday of the year. In the Fourth Circuit now, for example, a local government official can conduct a public meeting as offhandedly as he likes, with as much rudeness and indifference to a speaker's points as he can muster, without having to risk a citizen's objection to such behavior at the time it is happening. And the local official is free to evict and/or sanction that citizen for making such a criticism. This cannot be the law in the Fourth Circuit or in the United States.

### B. The "Personal Attacks" Ban is a Content-Based Restriction on Speech at a Public Meeting of a Local Governmental Body.

The Fourth Circuit noted that an insult directed at a Commission member personally and concerning the official's "qualifications for office or his conduct" could be relevant in a public meeting, but the Fourth Circuit still held that the "personal attacks" ban was content-neutral and was constitutional as a legitimate time, place and manner restriction on speech (Appendix at 19a-20a).

Such a ban, though, is necessarily content-based because it allows a speaker to praise the conduct or perceived virtues of a public official at a public meeting but also empowers a public official to silence any speaker who dares to criticize the official's conduct at the meeting or his fitness for office. *See Bach, supra*, 139 F. Supp.2d at 742-43; *Moore v. Asbury Park Board of Education*, No. Civ. A.05-2971-MLC, 2005 WL 2033687 (D. N.J., Aug. 23, 2005); *Leventhal v. Vista Unified School District*, 973 F. Supp. 951 (S.D. Cal. 1997); *Baca v. Moreno Valley Unified School District*, 936 F. Supp. 719 (C.D. Cal. 1996); *see infra*, at pp. 21-22.

Furthermore, the Fourth Circuit's reiteration of the *Good News Club* rational basis standard of review allowed it to consider even a content-based "personal attacks" ban to be constitutionally valid as a reasonable restriction in light of the purposes of the forum. Accordingly, whether a ban on "personal attacks" at a local government public meeting is a content-based or content-neutral restriction on speech and, if content-based, whether such a ban should be subject to strict scrutiny, represent issues of great constitutional importance that need to be decided.

### C. There is a Conflict in this Court's Own Opinions and Among the Circuits as to Whether a Content-Based Restriction on Speech in a Limited Public Forum is Subject to Strict Scrutiny or Must Only be Reasonable in Light of the Purpose of the Forum.

The Fourth Circuit's reliance on *Good News Club* in holding that the "personal attacks" ban is

constitutional because it is a reasonable restriction on speech exacerbates the conflict between the Circuits as to the proper review of a content-based restriction in a limited public forum. *See, e.g.*, Fischer, *supra*; Deutsch, *supra*; Huhn, *supra*.

This case deals with a specific type of such a forum, a public meeting of a local government body, and even with regard to that setting the Circuits are in conflict. To date, the Third Circuit,[5] in which there is an apparent internal conflict, and the Fourth Circuit have used the *Good News Club* standard concerning restrictions on speech in a public meeting, while in the Tenth Circuit[6] and in an earlier case in the Eleventh Circuit,[7] the courts have stated the stricter scrutiny standard outlined in *Cornelius* and prior Supreme Court cases.

### 1. *Conflict Between Supreme Court Cases*

The Supreme Court's problems in making the standard clearer in this particular context derive from the fact that this Court has not addressed the constitutionality of a content-based restriction on

---

[5]*Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3d Cir. 2004); *but see Monteiro v. City of Elizabeth*, 436 F.3d 397 (3d Cir.), *cert. denied*, __ U.S. __, 127 S. Ct. 116 (2006) (noting strict scrutiny would apply to a restriction on speech at a public meeting of a city council).

[6]*Mesa v. White*, 197 F.3d 1041, 1044-45 (10th Cir. 1999).

[7]*Jones v. Heyman*, 888 F.3d 1328 (11th Cir. 1989).

speech in a public meeting of a local government body in more than 30 years. *See Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976).

In *Madison Joint School District*, a union complained that a school board had engaged in a prohibited labor practice by allowing a nonunion teacher to speak at a public meeting about a collective bargaining issue. The state court held that the board had engaged in a prohibited labor practice.

This Court, though, held that a local government body conducting a public meeting could not discriminate against a citizen's speech based on his viewpoint:

> . . . [T]he participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972).

429 U.S. at 175-76.

In *Widmar*, a university excluded a student religious group from using university meeting space. The Court noted it had held in *Madison Joint School District* that when a state designates or creates such a forum for public speech, the state bears a "heavy burden" in justifying any exclusion of a particular viewpoint:

> The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. *See, e. g., Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175, and n.8, 97 S.Ct. 421, 426, 50 L.Ed.2d 376 (1976) (although a State may conduct business in private session, '[w]**here the State has opened a forum for direct citizen involvement,' exclusions bear a heavy burden of justification**).
>
> * * *
>
> . . . In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. **It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.**

454 U.S. at 267-70 (emphasis added) (some citations omitted); *see also Perry*, *supra*, 460 U.S. at 45-46 (when

a state designates a forum as a place for speech, such as a public meeting, the state must apply the same standards in seeking to restrict the public's speech as those which apply in a traditional public forum, and a content-based restriction in such a designated public forum is subject to strict scrutiny).

Then in *Cornelius*, the Court summarized *Widmar* and *Perry* in explaining the types of fora for speech and the differing standards of review applicable to a content-based restriction on speech in each. In *Cornelius*, a charity drive among federal employees was limited to certain types of nonprofit charitable agencies and excluded legal defense and political advocacy organizations, one of which sued.

The Court first stated that there are three types of traditional fora for speech and noted that in a limited or designated public forum, such as an open meeting of a local governmental body, the courts will apply strict scrutiny to content-based restrictions:

> Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *See Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S., at 45, 103 S.Ct., at 954. **Similarly, when the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.** Access to a nonpublic

> forum, however, can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.' *Id.*, at 46, 103 S.Ct., at 955.

473 U.S. at 800 (emphasis added) (some quotation marks and citations omitted); *see also Lamb's Chapel*, 508 U.S. at 391-93.

The majority in *Cornelius* held that the charity drive was a nonpublic forum and that the restriction on speech was reasonable, as long as the government did not engage in viewpoint discrimination. *Id.* at 801-06. Most tellingly, though, the *Cornelius* court's stated standard of review for content-based restrictions on speech in a nonpublic forum is now the exact same standard used by this Court in *Good News Club* with regard to a limited public forum. *Id.* at 800, 806.

In *Rosenberger*, the Court strayed from the strict scrutiny standard of review regarding content-based restrictions on speech in a limited public forum that had been repeated in the earlier cases. In *Rosenberger*, a student religious newspaper sued a university for excluding the paper from receiving grants from a student activities fund. The Court held that this was impermissible viewpoint discrimination but in dictum picked the nonpublic forum standard of review from *Perry* and *Cornelius* to describe the proper review of a content-based speech restriction in a limited public forum:

> The necessities of confining a forum to the limited and legitimate purposes for which it was

> created may justify the State in reserving it for certain groups or for the discussion of certain topics. *See, e.g., Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985); *Perry Ed. Assn., supra*, at 49, 103 S.Ct., at 957. **Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,'** *Cornelius, supra*, at 804-806, 105 S.Ct. at 3450-51; *see also Perry Ed. Assn., supra*, at 46, 49, 103 S.Ct., at 955, 957[.]

515 U.S. at 829 (emphasis added).

This Court reiterated this standard of review in *Good News Club*, another First Amendment suit brought by a religious group seeking access to public facilities. While the Court held that it did not need to decide if the content-based restriction was reasonable because the defendant had discriminated based on viewpoint, the Court again used the *Cornelius* nonpublic forum standard in dictum to describe the review of a content-based restriction in a limited public forum:

> When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.' *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115

> S.Ct. 2510, 132 L.Ed.2d 700 (1995); *see also Lamb's Chapel*, *supra*, at 392-393, 113 S.Ct. 2141. The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, *Rosenberger*, *supra*, at 829, 115 S.Ct. 2510, **and the restriction must be 'reasonable in light of the purpose served by the forum,'** *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

533 U.S. at 106-07 (emphasis added).

This conflict between the Court's earlier cases of *Widmar*, *Perry*, and *Cornelius* and the dictum in the more recent cases of *Rosenberger* and *Good News Club* has sown the confusion among the Circuits regarding the proper standard of review concerning content-based restrictions on speech in a limited public forum.

### 2. *Conflict Between the Circuits*

Again, the Circuits are "dazed and confused" concerning the proper standard of review of a content-based restriction on speech in any limited public forum. *See* Fischer, *supra*; Deutsch, *supra*; Huhn, *supra*. While a complete review of this conflict in every such context is not feasible here, the conflict in those circuit court cases dealing with a content-based restriction on speech in a public meeting of a local governmental body is illustrative.

The Third Circuit in *Eichenlaub*, in a case dealing with the eviction of a speaker at a public

meeting, expressly noted the dichotomy between the strict scrutiny applied to content-based restrictions in limited public fora in the earlier cases of *Widmar*, *Perry*, and *Cornelius* and the weakened scrutiny applied to such restrictions in *Rosenberger* and *Good News*:

> The Supreme Court has not precisely instructed where the limited public forum is located on the First Amendment spectrum between the strict test for public forum regulation and the more relaxed test for nonpublic regulation. **Earlier decisions, such as *Widmar* itself, 454 U.S. at 269-70, 102 S.Ct. 269, and *Perry Educ. Ass'n*, 460 U.S. at 45-46 & n. 7, 103 S.Ct. 948, suggest that content-based restraints on limited public forums must be subject to strict scrutiny, and can survive only if they are supported by a compelling interest. Recently, however, the Court has apparently moved to the position that regulation of a limited forum may survive under a test that is less strict than that applied in the case of a general open forum.** *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001). Under this refined test for reviewing limited forum restrictions, content-based restraints are permitted, so long as they are designed to confine the 'forum to the limited and legitimate purposes for which it was created.' *Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510; Two limitations remain. Any restrictions on speech must be viewpoint neutral and must be 'reasonable in light of the purpose served by the forum.' *Good News Club*, 533 U.S. at 106-07,

> 121 S.Ct. 2093 (quoting *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)).

385 F.3d at 280-81 (emphasis added) (some citations omitted).

The standard of review is so confused that the Third Circuit came back two years later and, while addressing the issue of qualified immunity, took the other side from *Eichenlaub* by holding that the president of a city council who had evicted a council member for criticizing the president's policies had violated a clearly established right because it was certain that strict scrutiny applied to any content-based restriction on speech in a public city council meeting. *Monteiro, supra*, 436 F.3d at 404.

The Tenth Circuit in *Mesa* expressly stated that the *Perry* and *Cornelius* strict scrutiny standard would apply to any content-based restrictions on speech at a county commission public meeting. 197 F.3d at 1045-46; *see also Jones, supra*, 888 F.2d at 1331 (the Eleventh Circuit noted that strict scrutiny would apply to any content-based restrictions on speech in the limited public forum of a public city council meeting).

The Tenth Circuit in *Mesa* disagreed with the district court that the commission acted in a content-neutral manner when the commission refused to allow the plaintiff to speak at a public meeting about the recent rehiring of a county manager. 197 F.3d at 1045, n. 4. The Tenth Circuit would have considered the ban a content-based restriction, therefore subject to strict scrutiny, but since the pro se plaintiff failed to properly

raise the issue, the Tenth Circuit held that it had to treat it as a content-neutral ban subject to an intermediate standard of review. *Id.* Even with this lesser standard of review, the Tenth Circuit held that the ban on the speaker was unconstitutional.

So, the Fourth Circuit's opinion in this case and the confusion among the circuits beg the question: Does this Court now apply the nonpublic forum rational standard of review to content-based restrictions in all limited public forum contexts, as it indicated in *Good News Club*? Or does the strict scrutiny standard from *Perry* and *Cornelius* apply to content-based restrictions in all limited public forum cases, or might it apply only in the particular context of a citizen at a public meeting making relevant criticism of a government official's execution of his public duties?

Again, the only workable rule is that a content-based restriction of such speech in a limited public forum should be subject to strict scrutiny and that this Court should grant the speaker the greatest amount of freedom of speech possible, short of expression that has traditionally not been entitled to the same presumptive protection under the First Amendment, such as obscenity, "fighting words," or defamation. *See, e.g., R.A.V., supra,* 505 U.S. at 382-86.[8] Discussion of public issues and debate on the qualifications of public officials have always been "integral to the operation of the system of government established by our Constitution." *Buckley, supra,* 424 U.S. at 14.

---

[8]Even content-based restrictions on speech concerning those less-protected categories can be unconstitutional if they prohibit criticism of government officials. *R.A.V., supra,* 505 U.S. at 384-85.

This is an issue of great constitutional importance also because it arises frequently concerning speech restrictions at public meetings. *See, e.g., Steinburg*; *Monteiro*; *Eichenlaub*; *Mesa*; *Jones*; *Musso*; *Bach*; *see also Timmon v. Wood*, Nos. 5:05-CV-127, 5:06-CV-07, 2008 WL 1808815 (W.D. Mich., April 21, 2008); *Osborne v. Lohr-Robinette*, No. 1:05-0106, 2006 WL 3761597 (S.D. W. Va., Dec. 20, 2006); *Brown v. City of Jacksonville*, No. 3:06-CV-122-J-20MMH, 2006 WL 385085 (M.D. Fla., Feb. 17, 2006); *Piscotonno v. Town of Somers*, 396 F. Supp.2d 187 (D. Conn. 2005); *Dietrich v. Ferguson*, No. 00-C-0671-C, 2002 WL 32357102 (W.D. Wis., May 29, 2002); *Zapach v. Dismuke*, 134 F. Supp.2d 682 (E.D. Pa. 2001).

### D. The "Personal Attacks" Ban is Unconstitutional on its Face.

#### 1. *Facially Unconstitutional as a Content-Based Restriction on Speech*

Regardless of the standard of review, a restriction on speech in a limited public forum that constitutes illegal viewpoint discrimination, such as the "personal attacks" ban, is unconstitutional. *See, e.g., Good News Club.* The "personal attacks" ban is not a reasonable restriction in relation to the purposes of a public meeting of a local governmental body. The ban is not narrowly tailored to serve a compelling state interest. Rather, the ban on its face discriminates against speakers who wish to criticize a government official at a public meeting for that official's conduct at that meeting or for his execution of his public duties. *See Bach*; *Moore*; *Leventhal*; *Baca.*

This Court stated in *Madison Joint School District* that "the participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." 429 U.S. at 175-76.

Yet this is precisely what the "personal attacks" ban accomplishes. As the court in *Bach* noted with regard to a school board's ban on "personal attacks" at public meetings:

> The contested provision . . . acts as a filter to screen out any negative comments toward the current administration, while allowing their proponents to speak at will. The Chairman can effectively 'gavel-down' and silence much criticism of school officials by interpreting such comments as attacks against honesty, integrity, or character. At the same time, a speaker would be able to proffer laudatory praises of the school officials without fear of being silenced, because the contested provision places no corresponding ban on statements that promote or inflate the honesty, integrity, or character of a named official.

139 F. Supp.2d at 742.

Also, the Court stated in *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978), that "[e]specially where the suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the

First Amendment is plainly offended." 435 U.S. at 785-86.

The Fourth Circuit held that the "personal attacks" ban was a reasonable restriction of speech to promote parliamentary order, but the term "personal attacks" is so vague and overbroad that the Commission's attempt to prevent the disruption of public meetings is completely subsumed by the ban's favoritism of one side of the argument. Any such ban, if allowed, should be worded in such a way that makes it clear that a speaker's criticism of a public official must be irrelevant to the public meeting, or be in a class of words not presumptively entitled to constitutional protection, such as obscenity, "fighting words," or defamation. *See R.A.V., supra*, 505 U.S. at 384-85. Even the Fourth Circuit admitted that an insult concerning the official's "qualifications for office or his conduct" could be relevant in a public meeting. (Appendix at 19a). Certainly, criticism expressed at a public meeting about a government official's behavior toward the speakers at that meeting is always relevant to the current agenda item.

In the First Amendment context, a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. *See, e.g., Washington State Grange v. Washington State Republican Party*, __ U.S. __, 128 S. Ct. 1184, 1190 (2008). Also, "where a vague rule abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the

unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Federal Election Commission v. Wisconsin Right to Life, Inc.*, __ U.S. __, 127 S. Ct. 2652, 2669 (2007).

### 2. *Facially Unconstitutional as a Content-Neutral Restriction on Speech*

Even if the "personal attacks" ban were considered to be content-neutral, it still is not a valid time, place or manner restriction "narrowly tailored to serve a significant government interest," *see Ward*, 491 U.S. at 791, because it is overly broad and vague and grants the Commission too much discretion to determine what constitutes a "personal attack" forbidden by the rule. *See Washington State Grange*; *Grayned*. Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998).

Also, there were no alternative channels of communication available because Steinburg was criticizing the Commission members' behavior at that very meeting. *See generally Ward*. Was he supposed to shut up and come back the next month when his comments would surely not be relevant? The Fourth Circuit seems to think that Steinburg's alternative channel of communication was to speak in a more measured tone, like the prior speakers (Appendix at

20a), but since when is a difference of emphasis or tone an alternative channel of communication? Frantel and Harton did not address the Respondents' rude behavior. Steinburg was in the same forum as them when the Respondents silenced him because of his criticism. Moreover, Steinburg did speak in a normal tone until Gecker had already cut off his speech by forcefully interrupting him, accusing him of "abusing the podium," and stating that he refused to listen to him.

### E. The Fourth Circuit Erred Because the Respondents Terminated Steinburg's Speech Pursuant to the Unconstitutional "Personal Attacks" Ban and Because the Respondents Unconstitutionally Applied the Ban in this Case.

The "personal attacks" ban is unconstitutional on its face and as the Respondents applied it in this case, notwithstanding the Fourth Circuit's holding that there was insufficient evidence that Steinburg was silenced pursuant to the ban. Notably, the Fourth Circuit did not even mention the summary judgment standard of review, which requires that the inferences drawn from the facts be viewed in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962) (the lower courts failed to draw inferences from the facts in the light most favorable to the nonmoving party). According to the Fourth Circuit's own precedent, the intention or motivation of the Respondents in cutting off Steinburg's speech is an issue to be decided by a jury. *See, e.g., Metric/Kvaerner Fayetteville v. Federal*

*Insurance Co.*, 403 F.3d 188, 197 (4th Cir. 2005); *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979) (citing *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962)).

Here, Gecker's termination of Steinburg's speech, done admittedly pursuant to the "personal attacks" ban, is directly attributable to the Commission, and this act alone is sufficient to hold the Commission liable. While a municipality is ordinarily not liable for its agents' violation of a person's constitutional rights, it is still liable if the violation is the result of that entity's policy. *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397 (1997); *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

*Musso v. Hourigan*, 836 F.2d 736 (2d Cir. 1988), illustrates that when a member of a public board who is not the chairman interrupts a speaker at a public meeting and precipitates the termination of the speaker's speech, that board member violates the speaker's First Amendment rights. Furthermore, such a violation, if based on an unconstitutional policy of the public board, as were Gecker's actions in this case, would then necessary render the public board liable under *Monell* and *Brown*.

In *Musso*, a procedural dispute broke out at a public meeting of a school board. The plaintiff rose from his seat and stated:

> George [referring to Mazzafero], I think you should adjourn the meeting as Timmy [Reardon, another Board member] said and forget about it.

> These people that can't think for themselves and have to depend on a superintendent that doesn't know what he is talking about.

836 F.2d at 738. Millar, an at-large member of the school board, then interrupted the plaintiff, shouted at him, and ordered him to be quiet. *Id.* Millar and Mazzaferro, the acting chairman, each then told the plaintiff he was out of order and had the police escort him from the room. *Id.*

The Second Circuit held that a genuine issue of material fact existed as to whether the at-large member had silenced the plaintiff because of the content of his speech, and, if that was his motive, his action violated clearly established First Amendment law. Also, the Second Circuit noted that other speakers had voiced their opinions without opposition, so a jury could infer that the at-large member cut off the plaintiff out of dislike for what he had to say. *Id.* at 742-43 (citations omitted).

Since the at-large member in *Musso* could be held liable for silencing the plaintiff, *Musso* also shows that Gecker's actions as the precipitating cause of the termination of Steinburg's speech can be attributed to the Commission even though he was not chairman. *See generally Brown*; *Monell.*

Moreover, *Hall v. Marion School District No. 2*, 31 F.3d 183 (4th Cir. 1994), illustrates that Litton's ratification of Gecker's actions makes the Commission liable. In *Hall*, a teacher sued a school district alleging that it violated her First Amendment rights when the district's school board terminated her. The teacher had

written letters to a newspaper criticizing the school district and its superintendent. 31 F.3d at 186. In retaliation, the superintendent drummed up grounds for the teacher's dismissal, *Id.* at 186-89, and the school board terminated the teacher. *Id.* at 190.

The teacher sued for the violation of her free speech rights, and the district alleged that it could not be held liable because the school board acted independently in terminating the teacher. The court rejected this defense and held that the school board had ratified the superintendent's unconstitutional conduct:

> Although the District claims that the Board acted independently of Foil in deciding to dismiss Hall, the district court found and the evidence shows otherwise . . . In this case, not only was the Board completely aware of Foil's actions, the Board was the only body that could fire Ms. Hall and it chose to do so. Therefore, by dismissing Hall the Board not only ratified Foil's unconstitutional behavior, but also participated in the violation of Hall's First Amendment rights. Since the Board is the final policymaker in this area of the District's business, we find that the District may be held liable for the act of the Board in dismissing Hall.

*Id.* at 196; *see City of St. Louis v. Prapotnik*, 485 U.S. 112, 127 (1988) (if a municipality's final policymaker ratified a subordinate's unconstitutional behavior, the municipality is liable under § 1983). Likewise, the Commission ratified and participated in Gecker's unconstitutional behavior as soon as Litton joined in with Gecker to cut off Steinburg.

Even if Gecker did not suppress Steinburg's speech, and Litton was the person who actually terminated it, there is a genuine question of material fact as to whether Litton was acting pursuant to the "personal attacks" ban. Litton had received a copy of the Suggested Practices and Procedures when he joined the Commission, including the ban on "personal attacks," and he had read them prior to the meeting (Fourth Cir. Appendix at 61-62, 416). Litton allowed Frantel, Harton, Shewmake, and the Commission members to talk about the mines issue at great length, well beyond the technical aspects of the deferral. He, though, did not allow Steinburg to address the attentiveness and integrity of the Commission members at the meeting.

Also, it was Turner, the Commission's Planning Director, who had summoned Officer Profita by pressing the alarm button. Turner knew of the "personal attacks" ban (Fourth Cir. Appendix at 684-85, 688-89). Turner testified at his deposition that Steinburg's remarks at that point had gotten "personal' and that the meeting was "out of control" (*Id.* at 256, 260). Especially noteworthy is that Turner summoned the police before Litton took any action or announced that he was cutting off Steinburg. Turner summoned the police because he felt that Steinburg's speech criticizing Gecker was violating the Commission's policy barring "personal attacks," and the Commission can be held liable to the extent Turner did so in implementation of that policy.

### F. The Fourth Circuit Erred in Holding that Steinburg's Motion to Amend to Add Gecker and Litton as Individual Defendants was Futile Because They Engaged in Viewpoint Discrimination by Silencing Steinburg in Response to his Criticism.

The amendment to add Gecker and Litton as individual defendants was not futile because the record shows that they engaged in viewpoint discrimination by allowing other speakers and Commission members to talk at length about the mines but interrupting and terminating Steinburg's speech as soon as he criticized their behavior at the meeting.

A public official's challenge to a citizen's speech at a public meeting that the citizen is "abusing the podium" is the equivalent of telling him to stop speaking. First Amendment retaliation cases are instructive. Because retaliation by a government official tends to chill an individual's exercise of First Amendment speech rights, a government official may not respond to an individual's protected activity with retaliatory conduct or speech, even though that conduct or speech would otherwise be a lawful exercise of public authority. *The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 415 (4th Cir. 2006) (citing *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 674 (1996).

A plaintiff has a cause of action under § 1983 for the violation of his First Amendment rights where government conduct or speech would have a chilling effect or adverse impact on the protected activity of a

person of ordinary firmness. *Baltimore Sun Co.*; *Blankenship v. Manchin*, 471 F.3d 523, 530-33 (4th Cir. 2006); *see generally Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968).

Gecker's retaliatory outburst interrupting Steinburg chilled and intimidated Steinburg's speech. It is noteworthy that, after Gecker interrupted Steinburg, the remainder of Steinburg's turn at the rostrum was limited to his appealing to Litton to not cut off his speech. Also telling is the nervous laughter from the citizens in the audience in response to Litton's asking after Steinburg's eviction "Is there anyone else who would like to speak to the deferral?" The members of the audience reasonably felt intimidated by the Commission's handling of Steinburg's criticism.

In *Musso*, the at-large member certainly chilled the plaintiff's speech. There, the Second Circuit held that there was a question of fact as to whether the at-large-member terminated the plaintiff's speech based on viewpoint discrimination, where the at-large-member, without parliamentary authority, interrupted the plaintiff, shouted at him, and ordered him to be quiet. 836 F.2d at 739. Likewise, Gecker's intimidating tactics also demonstrate viewpoint discrimination.

As to Litton, he acted inconsistently in allowing other speakers and Commission members to address matters not technically concerning the deferral, but only when Steinburg criticized the Respondents' treatment of the first two speakers at the hearing, and only after Gecker interrupted and shouted down Steinburg, did Litton immediately decide to terminate

Steinburg's speech. Again, criticism expressed at a public meeting about a government official's behavior toward the speakers at that meeting is always relevant to the current agenda item, yet Litton did not let Steinburg speak.

## CONCLUSION

The Court should grant this Petition for Certiorari to resolve the conflict between the Court's cases and between the circuits as to the proper First Amendment standard of review of a content-based restriction on speech in a limited public forum, especially in the particular context of a citizen at a public meeting expressing relevant criticism of a government official's execution of his public duties. The only workable rule is that a content-based restriction of such speech in a limited public forum should be subject to strict scrutiny and that this Court should grant the speaker the greatest amount of freedom of speech possible, short of expression that has traditionally not been entitled to the same presumptive protection under the First Amendment, such as obscenity, "fighting words," or defamation.

Also, the Court should grant this Petition for Certiorari and address the viewpoint discrimination that Steinburg has suffered as a result of the unconstitutionally vague and overbroad "personal attacks" ban and at the hands of the Respondents based on their dislike of Steinburg's criticism. Otherwise, if the Fourth Circuit's opinion is allowed to stand, the free speech of any citizen in that circuit who wishes to criticize the behavior of a government official at a public meeting, or to question his fitness for office, will

be substantially chilled.

Respectfully submitted,
James B. Thorsen
Counsel of Record
James B. Thorsen, P.C. & Associates
3810 Augusta Avenue
Richmond, VA 23230
(804) 359-3000 (Phone)

John W. Whitehead
Douglas R. McKusick
The Rutherford Institute
1440 Sachem Place
Charlottesville, Virginia 22901

(any footnotes trail end of each document)

No. 07-1181

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT C. STEINBURG,
Plaintiff-Appellant,

v.

CHESTERFIELD COUNTY PLANNING COMMISSION; DANIEL A. GECKER, in his official capacity; SHERMAN W. LITTON, in his official capacity,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge. (3:06-cv-00248-REP).

January 31, 2008, Argued

May 29, 2008, Decided

Before NIEMEYER and SHEDD, Circuit Judges, and Patrick Michael DUFFY, United States District Judge for the District of South Carolina, sitting by designation.

Judge Niemeyer wrote the opinion, in which Judge Shedd and Judge Duffy joined.

COUNSEL

ARGUED: James Broome Thorsen, THORSEN & SCHER, L.L.P., Richmond, Virginia, for Appellant.

Steven Latham Micas, County Attorney, COUNTY ATTORNEY'S OFFICE FOR THE COUNTY OF CHESTERFIELD, Chesterfield, Virginia, for Appellees. ON BRIEF: Jeffrey L. Mincks, Stylian P. Parthemos, COUNTY ATTORNEY'S OFFICE FOR THE COUNTY OF CHESTERFIELD, Chesterfield, Virginia, for Appellees.

## OPINION

NIEMEYER, Circuit Judge:

Robert Steinburg, a citizen of Chesterfield County, Virginia, contends that on October 18, 2005, the Chesterfield County Planning Commission and two of its members violated his First Amendment rights when the chairman of the Commission had him removed from a public meeting of the Commission. Steinburg commenced this action, contending that he was unconstitutionally silenced while speaking because the commissioners disagreed with the viewpoint he expressed, which criticized the way in which the Commission was conducting its business.

The district court entered summary judgment in favor of the defendants, finding that Steinburg was removed from the podium and the meeting because he refused to address the only topic for which the public hearing had been opened and because he behaved in a hostile manner that threatened to disrupt the orderly progress of the meeting. The court simultaneously denied Steinburg's motion to amend his complaint to assert

additional claims and add a new defendant because it found that such amendments were untimely and would be futile in light of the fully developed record before it.

We agree with the district court that Steinburg was excluded from the public meeting because of his refusal to address the topic for which the meeting was opened and because of his disruptive manner, and not because of any viewpoint he expressed. Inasmuch as the Commission was authorized to set its subject matter agenda and to cut off speech that was reasonably perceived to threaten disruption of the orderly and fair progress of the meeting, we conclude that the Commission and its members did not violate Steinburg's First Amendment rights in excluding him. We also find that the district court did not abuse its discretion in denying Steinburg's motion to amend his complaint. Accordingly, we affirm.

I

The Chesterfield County Planning Commission, created under Virginia Code § 15.2-2210 "to promote the orderly development of the locality and its environs," conducts regular public meetings, which are generally videotaped for local television broadcast, as was the October 18, 2005 meeting, from which this case arose.

Some time prior to October 18, 2005, Robious Investments LLC, a developer, had filed an application with the Commission for an amendment to the zoning ordinance governing its development known as the Tarrington Subdivision. The application requested that the Commission change the zoning ordinance to permit development of homes with front-facing, rather than

side-facing, garages. The application was scheduled to be heard at the October 18 meeting, but at some point shortly before the meeting, Robious filed a request that the Commission defer consideration of its application until the Commission's next meeting in November.

Acting in accordance with the Commission's bylaws, Commission Chairman Sherman Litton invited citizens at the October 18 meeting to speak only on the limited issue of whether to grant Robious' request to defer consideration of its application for a zoning change, and as Nancy Frantel, a county citizen, approached the podium to speak, Chairman Litton reiterated that the subject of the hearing was "just on the deferral." Acknowledging the limited subject matter, Frantel delivered a presentation in which she stated her support for the deferral request and frequently mentioned the garage-door issue. Her main point, however, was to express her concern about the presence of a network of abandoned mine shafts below the surface of the earth where certain sections of the Tarrington Subdivision would be built. Frantel spoke for approximately six minutes, without interruption from Commission members, speaking calmly and respectfully throughout. After Frantel concluded her remarks, Commissioner F. Wayne Bass asked follow-up questions because, as he later explained, he had not been on the Commission when the Tarrington Subdivision was originally zoned. Commissioner Bass and Frantel exchanged comments about the mines for an additional two to three minutes.

Before the next speaker, Mike Harton, approached the podium, Chairman Litton asked him whether he was in favor of the deferral, indicating that "I'd rather not hear

the case tonight." Harton replied, "I will speak to the deferral, sir." Like Frantel before him, Harton mentioned the deferral of the hearing on Robious' application to reorient the garage doors, but then he too turned to the potential hazards of the abandoned mines. When Harton had spoken for about two minutes about the mines, Commissioner Daniel Gecker asked Harton whether he was in favor of or opposed to the deferral. Harton replied that he was in favor of the deferral and then attempted to resume his presentation on the abandoned mines. Chairman Litton interrupted him and stated, "Sir, we get to hear this case next month. If you're, if you're opposed to the deferral or for it, then let's talk to the deferral, but I don't want to hear the case tonight. The case is going to come back, and you'll have a chance to present all your documentations at that time." Harton responded that he wanted to show the Commission why he thought they should "reconsider this altogether when the deferral comes up," asserting that the abandoned mines created "a serious safety hazard here, regardless of how the garage doors are oriented. It makes no difference whether they're on the front, the back or the side." Harton concluded his comments by encouraging the Commission both to defer the case and to "look seriously at the dangers involved of building over a cobweb of mines." Again, Harton's presentation was made calmly and respectfully throughout.

After Harton yielded the floor, Commissioner Gecker called on the developer's representative, William Shewmake, to clarify the issue of the abandoned mines. Commissioner Gecker acknowledged that "this doesn't deal with the deferral, Mr. Chair, but since you have let everybody else speak long past the deferral issue,

maybe we can put this one to bed also." In an exchange that lasted less than a minute, Shewmake confirmed that the developer had hired a firm to survey the property to determine the location of any abandoned mine shafts before development was to begin.

In response to Chairman Litton's invitation for further public comment on the deferral request, Robert Steinburg came to the podium.

But unlike the previous two speakers, he made no effort to relate his comments to either the developer's deferral request or the orientation of the garages. Because it is the subject matter, as well as the tone, of Steinburg's speech that is at issue, his presentation is reproduced in full:

> Good evening, ladies and gentlemen, my name is Bob Steinburg, and I am President of the Old Gun Road Civic Association, which represents 600 homes in the historic Old Gun Road corridor. And uh, we have some, we had our annual picnic here last week, and I can tell you that there is a great deal of concern about this particular project, and uh, these are health and safety concerns that are not only environmental in nature, but you've heard a great deal tonight from the speakers who have stepped up to the bar so far.
>
> Now I, I understand that you're not making a decision as it relates to this particular issue this evening, but I think it is very, very important to apprise you, if you are not already aware, that uh, this is an issue that people it's a very volatile

> issue. I've lived in this corridor for thirty years, and I can tell you I haven'tt seen people this hot about anything like this, ever.
>
> This is a *very serious* issue. One of the things that troubles me when some of these things are being presented this evening is a lot of bantying [sic] about back and forth by some of you who don't seem to be paying attention, or else are talking about something that perhaps, uh, might not even be related. And I can tell you that perception is reality in the eyes of many. What you are talking about, I have no idea. Mr. Gecker, you in particular, leaning over and saying this, that, and the other thing, but I can tell you from a perception standpoint from someone who is concerned, like myself and the others in this room, it's not very flattering. Believe me.

After Steinburg had spoken for less than two minutes, Commissioner

Gecker interjected, and the following exchange took place:

> COMMISSIONER GECKER: Mr. Steinburg, abusing this podium is not very flattering—
>
> STEINBURG: That is not abusing the podium, sir. That is *not* abusing the podium. I am telling you what I observed. I am a citizen. I am representing 600 households here at their bequest [sic] tonight, and you will listen to what I am saying. Sir.

COMMISSIONER GECKER: No, sir, you will not talk to me that way. I am not going to listen to what you've got to say on a deferral motion when you come up and speak to something other than the deferral. The Old Gun Road Association—

STEINBURG: That *is* with regard to the deferral, sir—

COMMISSIONER GECKER:--that you represent supported the Tarrington rezoning—

STEINBURG: [shouting] Mr. Gecker, would you please give me the right to speak? Who do you think you are?

CHAIRMAN LITTON: I'm going to cut you off. I'm Chairman, I can cut—

STEINBURG: Mr. Litton, yes you can, you can do that.

CHAIRMAN LITTON: And I am. This has gone way past. I've given you the courtesy. This is nothing but a deferral. This has nothing to do with the case. So just please sit down.

STEINBURG: I'm *not* sitting down. I'm not done talking yet. Ask Kirk Turner, he knows me. I'm not a wild citizen.

COMMISSIONER GECKER: Is there -- Mr. Turner, is that right?

STEINBURG: Let me speak!

CHAIRMAN LITTON: I, you know, I've, I've heard enough on this case tonight. I'm going to cut it off, okay.

STEINBURG: Can you tell me why you're cutting it off?

CHAIRMAN LITTON: Because it's strictly a deferral, and we're not arguing the case tonight. The case will be discussed at some time, at a later time. If you're telling me that you're in favor of the deferral, that's all I need to know. If you don't want the deferral, then that, you can argue –

STEINBURG: You don't want any background information on any thing. I, it sounds to me like you people have already made up your mind as to what you're going to do.

CHAIRMAN LITTON: I don't need the information tonight because I'm going to hear the case again next month.

STEINBURG: I understand that, sir. All I'm asking for is respect from you. I'll give ~~you~~ respect, you give me respect. That's all I want.

CHAIRMAN LITTON: I'm asking you just to sit down, please.

STEINBURG: I know you are. I understand what you're doing. And when I am through speaking I will sit down.

CHAIRMAN LITTON: No, I think you're going to sit down now.

STEINBURG: I'm not!

At that point, Chairman Litton directed a request to Police Officer James Profita, who had entered the meeting room in response to an electric alarm that had been pressed by Kirk Turner, the Chesterfield County director of planning who, by virtue of his position, served as secretary of the Commission.

CHAIRMAN LITTON (to Officer Profita):

Would you ask him to sit down, sir?

OFFICER PROFITA (to Steinburg):

Sir, you can sit down right now, or you can come with me. It's come to that option.

STEINBURG: And why am I sitting down?

OFFICER PROFITA: Disorderly conduct, for one.

STEINBURG: This is disorderly conduct in a public forum?

OFFICER PROFITA: Yes, sir, they've asked you to sit down and you're not cooperating.

STEINBURG: Let the record show that this gentleman has just asked a citizens [sic] from Chesterfield County who is speaking to this issue to sit down. *This* is what is wrong with the County of Chesterfield. *This* is what you people are doing.

[Profita approaches Steinburg]

I'll go with you! Just hang on.

OFFICER PROFITA: You're done speaking. You're done speaking.

STEINBURG: Show me the way!

OFFICER PROFITA: You're done speaking, please. Let's go. [Profita places his hand on Steinburg's arm. Steinburg places his hand on Profita's side.] Get your hands off of me.

STEINBURG: Get your hands off of *me*!

OFFICER PROFITA: You're done. Put your hands behind your back.

[Profita and another officer escort Steinburg from the podium and out of the meeting room.]

After Steinburg was removed from the meeting, the Commission agreed that the only issue before it was Robious' deferral request and, following a motion, voted to grant the request, postponing the hearing for 30 days on its application for a zoning change.

In April 2006, Steinburg commenced this action against the Commission, Chairman Litton, and Commissioner Gecker in their official capacities, seeking an injunction prohibiting the defendants from restraining his speech and, in particular, prohibiting enforcement of the Commission's policy prohibiting "personal attacks" during meetings. He also requested compensatory and punitive damages.

On cross-motions for summary judgment, the district court entered judgment in favor of the defendants, concluding that the incontrovertible evidence showed that Chairman Litton, not Commissioner Gecker, restricted Steinburg's speech and that "he did so after repeatedly informing all speakers that the topic to be addressed was the request for deferral." The court also concluded that because there was insufficient evidence to prove that Steinburg was silenced because of the Commission's policy against personal attacks, it would not reach the question raised by Steinburg of whether that policy was unconstitutional. At the same time that the court decided the summary judgment motions, it also issued an order denying Steinburg's request to amend his complaint to sue the individual defendants in their individual capacities, to challenge the Commission's time, place, and manner restrictions on speech, and to add Officer Profita as a defendant. The district court denied that motion because it violated the controlling scheduling order and because the amendments sought would be futile.

Steinburg appealed, challenging both the district court's grant of summary judgment to the defendants and its refusal to allow him to amend his complaint.

## II

For his principal argument, Steinburg contends that Chairman Litton and Commissioner Gecker unconstitutionally silenced his speech (1) by enforcing the unconstitutional Commission policy against "personal attacks" and (2) by cutting off his right to speak, based on his viewpoint. He points to Commissioner Gecker's accusation that Steinburg was "'abusing the podium' . . . as soon as Steinburg criticized him by name" and to Chairman Litton's immediate intervention to "cut off Steinburg after he criticized Gecker and the Commission for their handling of the deferral debate" and have him removed from the public meeting. Steinburg argues that the defendants had "no power to restrict [his] expression because of its message, its ideas, its subject matter, or its content."

We address Steinburg's double-layered argument first by addressing his assertion that the Commission, in cutting off his speech, was enforcing an unconstitutional policy that prohibited speakers from engaging in "personal attacks" and then by addressing his claim that Chairman Litton's cutting him off and excluding him from the meeting silenced his speech based on his viewpoint. But we begin by recognizing with respect to both layers of Steinburg's argument that the standards for determining whether the Commission unconstitutionally restricted Steinburg's speech in a public forum depend on the nature of the forum. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001).

In the traditional public forum, which includes the streets, sidewalks, parks, and general meeting halls,

speakers' rights are at their apex. Speakers have a right to speak free of any government-imposed restrictions on their speech unless the restrictions are reasonable time, place, and manner restrictions; are content-neutral; and are "narrowly tailored" to serve a significant governmental interest. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 295, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984). In addition, content-based restrictions may be imposed in a traditional public forum where there is "a clear and present danger that [the speech] will bring about the substantive evils that [government] has a right to prevent," *Schenck v. United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470, 17 Ohio L. Rep. 26, 17 Ohio L. Rep. 149 (1919), and where the restrictions are narrowly drawn to serve that compelling state interest, *see Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376, 381 (4th Cir. 2006) (citing *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)).

Distinct from the traditional public forum is the "limited public forum," which governmental entities may create in a specified location for a limited use, so long as they do not impose those limits in a manner that discriminates based on the speaker's viewpoint. Thus, "[w]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified 'in reserving [its forum] for certain groups or for the discussion of certain topics.'" *Good News Club*, 533 U.S. at 106 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (second alteration in

original)). In a limited public forum, however, the government still "'must not discriminate against speech on the basis of viewpoint,' and any restriction 'must be reasonable in light of the purpose served by the forum.'" *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067-68 (4th Cir. 2006) (quoting *Good News Club*, 533 U.S. at 106-07).

In this case the parties agree that the Commission's public meeting was a "limited public forum," and we concur in that assessment. Accordingly, a government entity such as the Commission is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business. But any restriction must not discriminate on the basis of a speaker's viewpoint. *See Good News Club*, 533 U.S. at 106-07; *Collinson v. Gott*, 895 F.2d 994, 1000 (4th Cir. 1990) (Phillips, J., concurring).

In *Collinson*, through three separate opinions of the three panel members, we held that the chairman of a board of county commissioners was entitled to immunity against a claim that he had violated the free speech rights of a man by ruling him out of order while speaking at a board meeting and having him removed from the meeting by the police. While we do not rely on *Collinson*'s immunity holding, we do accept the uncontroversial contours of the government's ability to restrict speech in a limited public forum, as summarized by Judge Phillips in his concurring opinion:

1. Speech at public meetings called by government officials for discussion of matters of public concern is entitled to normal first amendment protections against general restrictions or *ad hoc* parliamentary rulings by presiding officials. *City of Madison[ Joint Sch. Dist. v. Wisc. Employment Relations Comm'n]*, 429 U.S. [167,] 175-76 [(1976)], 97 S. Ct. at 426-27.

2. Because of government's substantial interest in having such meetings conducted with relative orderliness and fairness to all, officials presiding over such meetings must have discretion, under the "reasonable time, place and manner" constitutional principle, to set subject matter agendas, and to cut off speech which they *reasonably* perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner.FN3 This obviously contemplates that in this setting the content of speech may properly be the conscious target of state action (where it is cut off for irrelevance or manner of delivery), or its collateral victim (when it is cut off for excessive duration). But this consequence assuredly lies within well-established constitutional principles, once it is accepted, as I think we must, that disruption of the orderly conduct of public meetings is indeed one of the "substantive evils that [government] has a right to

prevent." *Schenck*, 249 U.S. at 52, 39 S. Ct. at 249.

FN3. The "disruption" to which this interest extends -- as an "evil" to be avoided -- is of course not confined to raw, physical violence, but includes any conduct that significantly violates generally or specially established rules of parliamentary order, and "disrupts" by that means the orderly conduct of a meeting.

3. As indicated, official discretion here is not limitless. The limits can be found in the well-established principle that the primary concern of the no-censorship-of-content requirement is with speaker viewpoint rather than with subject matter *per se*. *See generally* Stone, *Restriction of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 83, 108 (1978) (distinction noted). While the latter will yield fairly readily to time, place and manner restrictions, the former will but rarely, if ever, do so. Thus, while a ruling, "We will not listen to your views on capital punishment at this public hearing on rezoning," certainly must be constitutionally permissible, a ruling, "We will not listen to yours or any views favoring rezoning at this rezoning hearing," obviously would not be. *See City of Madison*, 429 U.S. at 175-76 & n.8, 97 S. Ct. at 426-27 & n.8 (contrasting impermissibility of viewpoint

> restrictions with permissibility of general subject matter restrictions in conduct of public meetings).

*Collinson*, 895 F.2d at 1000 (Phillips, J., concurring).

With these principles applicable to limited public forums in hand, we now address Steinburg's arguments, beginning with his challenge of the Commission's policy against personal attacks.

A

On the policy against personal attacks, Steinburg claims that Commissioner Gecker interrupted him for "abusing the podium" and "criticizing" Gecker by name, and he argues that Chairman Litton merely took up Gecker's cause by excluding Steinburg from the meeting. Thus, according to Steinburg, the two commissioners were in tandem and *sub silentio* enforcing the Commission's policy against personal attacks, which he argues was an unconstitutional policy under the holding of *Bach v. School Board of Virginia Beach*, 139 F. Supp. 2d 738 (E.D. Va. 2001). In *Bach*, the court struck down as unconstitutional a school board policy prohibiting speakers from making "attacks or accusations regarding the honesty, character, integrity or other like personal attributes of any identified individual or group." *Id.* at 741. The court found that

> [t]he contested provision tests the boundaries of the fine distinction between content-based and content-neutral regulations. First Amendment scholars, judges, and attorneys could engage in endless debate over whether it discriminates

> against speech on the basis of its content by allowing general praise while silencing criticism. Fortunately, the Court need not engage in such a comprehensive analysis, for a policy that deters individuals from speaking out on an issue of public importance violates the First Amendment. The contested provision has that effect and for that reason is unconstitutional.

*Id.* at 743 (citation omitted).

The Commission's policy against "personal attacks" focuses on two evils that could erode the beneficence of orderly public discussion. First, as an insult directed at a person and not speech directed at substantive ideas or procedures at issue, a personal attack is surely irrelevant--unless, of course, the topic legitimately at issue is the person being attacked, such as his qualifications for an office or his conduct. Second, as an insult directed at a person and not the issues at hand, a personal attack leads almost inevitably to a responsive defense or counterattack and thus to argumentation that has the real potential to disrupt the orderly conduct of the meeting. As we observed in *Collinson*, this disruption may take the form of speaking on irrelevant subjects, of speaking too long, or of speaking in a tone or manner that threatens disruption. 895 F.2d at 1000 (Phillips, J., concurring).

The Commission has a significant interest in maintaining civility and decorum during the public comment sessions of its public meetings, both to ensure the efficient conduct of the people's business and to maximize citizen participation in the discussion. *See id.* To further these legitimate public interests, therefore,

the Commission adopted a policy against personal attacks.

We conclude that a content-neutral policy against personal attacks is not facially unconstitutional insofar as it is adopted and employed to serve the legitimate public interest in a limited forum of decorum and order. Such a policy is deemed content-neutral when it "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

Moreover, denying a speaker at the podium in a Commission hearing the right to launch personal attacks does not interfere with what that speaker could say without employing such attacks. The same message could be communicated, indeed probably more persuasively, as we have witnessed in the videotape of the presentations of other speakers at the proceedings in this case. In the language of First Amendment jurisprudence, the Commission's policy in this case has left open "'ample alternative channels for communication of the information.'" *Id.* at 791 (quoting *Clark*, 468 U.S. at 293).

We therefore reject Steinburg's facial challenge to the Commission's policy prohibiting speakers from engaging in personal attacks, and we find the opinion in *Bach*, on which Steinburg relies, to be inconsistent with our jurisprudence on this issue.

> Of course, this holding does not preclude a challenge premised on misuse of the policy to

chill or silence speech in a given circumstance. As for Steinburg's argument that the Commission's policy was in fact used to silence him, it does not appear from the videotape or the transcript of the hearing in this case that the policy against personal attacks was invoked or applied. Steinburg argues that the policy was surely what Chairman Litton and Commissioner Gecker had in mind as they excluded him. But based on the videotape of the meeting, it appears that Chairman Litton excluded Steinburg because of his refusal to remain on subject and because of Chairman Litton's observation, as presiding officer of the meeting, that the discussion was degenerating quickly into a situation which would disrupt the parliamentary order. As Commissioner Gecker and Steinburg had their exchange, which undoubtedly raised the temperature in the hearing room, Steinburg told Commissioner Gecker, "[Y]ou will listen to what I am saying." Gecker responded, "No, sir, you will not talk to me that way." Steinburg then started talking over Gecker. At that point, Chairman Litton took control, noting that the discussion had "gone way past" the deferral issue and instructing Steinburg to "please sit down." Steinburg refused, stating, "I'm *not* sitting down. I'm not done talking yet." When Chairman Litton explained the scope of the meeting to Steinburg and invited him to continue speaking on the deferral issue or to speak to the merits later, at the November meeting, Steinburg insisted on giving background information and demanded respect. Chairman Litton then repeated his request to Steinburg, "I'm asking you just to sit

down, please." Upon Steinburg's refusal to obey his instruction, Chairman Litton excluded Steinburg from the meeting, as described in the following portion of the meeting's transcript:

CHAIRMAN LITTON: No, I think you're going to sit down now.

STEINBURG: I'm not!

CHAIRMAN LITTON (To Officer Profita):

Would you ask him to sit down, sir?

OFFICER PROFITA (To Steinburg):

Sir, you can sit down right now, or you can come with me. It's come to that option.

STEINBURG: And why am I sitting down?

OFFICER PROFITA: Disorderly conduct, for one.

STEINBURG: This is disorderly conduct in a public forum?

OFFICER PROFITA: Yes, sir, they've asked you to sit down and you're not cooperating.

Officer Profita then escorted Steinburg from the room.

It is apparent that the parliamentary order of the proceedings was put at risk by Steinburg's refusal to

obey the chairman's ruling that Steinburg was out of order and the chairman's instruction to sit down.

All of the evidence in the record is consistent with Chairman Litton's intent to cut off the irrelevant, off-topic discussion, to restore order, and to prevent the meeting from spiraling out of control, as was his right and duty as chair. At no time during the meeting did Litton cite the "personal attacks" policy, nor did he ever express a view that he considered Steinburg's comments during the meeting to constitute a "personal attack." We agree with the district court's conclusion that the "evidence is insufficient to prove that Steinburg was silenced because of the policy."

B

Steinburg also contends that he was improperly excluded from the Commission meeting for expressing his viewpoint, criticizing the way the Commission was going about its business. Again, however, we conclude that the record does not support his claim that he was silenced because he expressed a particular viewpoint.

Beginning with Steinburg's discussion with Commissioner Gecker, during which Steinburg was indeed expressing criticism, there is no evidence to support a claim that Gecker silenced Steinburg's speech, nor that Gecker requested the Chairman to do so. Rather, Gecker observed about Steinburg's criticism that his "abusing this podium [was] not very flattering." After Steinburg took issue with the observation that he was abusing the podium, he instructed Gecker, "[Y]ou will listen to what I am saying." Commissioner Gecker said, "No, sir, you will not talk to me that way. I am not

going to listen to what you've got to say on a deferral motion when you come up and speak to something other than the deferral. The Old Gun Road Association --" At that point, after Steinburg interrupted Commissioner Gecker, Chairman Litton intervened and told Steinburg that Chairman Litton, as the presiding officer, was going to cut him off. Thus, Commissioner Gecker was not instrumental in any sense in silencing Steinburg. Gecker simply challenged the premise underlying Steinburg's criticism and expressed his intent not to listen. Whether expressing such an intent was an appropriate response for a commissioner can be debated, but that response did not amount to a violation of Steinburg's First Amendment rights. *See Minn. State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 283, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984) (noting that there is "no constitutional right to force the government to listen to [one's] views").

As for Chairman Litton, he did attempt to cut Steinburg off and ultimately he excluded Steinburg from the meeting. But Chairman Litton's concern was explicitly focused on having Steinburg stay on subject and on conforming his manner to the order that was necessary. Chairman Litton's first statement after announcing his intent to cut Steinburg off made clear that his motivation was purely to keep the meeting from degenerating into an irrelevant argument unrelated to the item on the agenda: "This has gone way past. I've given you the courtesy. This is nothing but a deferral. This has nothing to do with the case. So just please sit down." In response to Steinburg's question asking why he was being cut off, Chairman Litton stated directly and clearly, "Because it's strictly a deferral, and we're not arguing the case tonight. The

case will be discussed at some time, at a later time." Litton even tried to afford Steinburg an opportunity to continue addressing the Commission on the deferral issue: "If you're telling me that you're in favor of the deferral, that's all I need to know. If you don't want the deferral, then that, you can argue --." But he could not complete this offer to Steinburg to argue for or against the deferral because Steinburg interrupted him, accusing the Commission of not wanting any "background information." Chairman Litton continued to remind Steinburg that the matter before the Commission was limited in scope to the deferral of a request to change the orientation of garages, and had nothing to do with abandoned mines or the overall zoning case that had been addressed by some previous speakers.

Steinburg argues that an inference of viewpoint discrimination can be drawn from the fact that Chairman Litton permitted Frantel and Harton to speak off-topic about abandoned mines even though that subject was irrelevant to the deferral request before the Commission, whereas Chairman Litton cut off Steinburg as soon as he voiced criticism of the Commission. The record, however, does not support this argument. While Chairman Litton did permit Frantel to deliver her presentation without interruption, even though much of it was at best only tangentially related to the deferral, he also told her that the subject matter was the deferral and he received her position on the deferral. With respect to Harton, Chairman Litton reminded Harton before he began speaking, perhaps in response to Frantel's speaking off-topic, that the hearing was limited to the deferral and that he would "rather not hear the case tonight."

Harton promised that he would "speak to the deferral," but he roamed off-topic and within two minutes he was interrupted twice -- first by Commissioner Gecker in an attempt to determine his position on the deferral since he had not given it, and a second time by Chairman Litton to remind him once again that the topic of the public hearing was the deferral, not abandoned mines. Harton then quickly concluded his off-topic discussion.

Steinburg was treated no differently. Again he was reminded of the topic of the public hearing, but rather than address the deferral, he became argumentative and disruptive. When it became clear to Chairman Litton that Steinburg had no intention of addressing the deferral but instead intended to continue discussing irrelevant topics, he intervened to cut off Steinburg's comments.

Exercising this type of discretion is precisely what we have observed that presiding officers may do. "[O]fficials presiding over such meetings must have *discretion*. . . to cut off speech which they *reasonably* perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner." *Collinson*, 895 F.2d at 1000 (Phillips, J., concurring) (first emphasis added). Chairman Litton consistently stated that he was cutting Steinburg off because his comments were irrelevant and duplicative of what had come before. It is also plain from the videotape that Steinburg had raised his voice, had become argumentative, and was refusing to abide by rulings and directions of the chair. In view of these facts, we do not agree with Steinburg's assertions that Chairman Litton's treatment of him was

inconsistent with Chairman Litton's treatment of other speakers and that Chairman Litton discriminated against Steinburg's viewpoint.

We conclude that Chairman Litton acted well within his discretion as chair of the meeting to take the steps he deemed necessary to retain control, restore order, and resume progress of the meeting, and there simply is no evidence in the record to support Steinburg's claim that he was silenced for expressing his viewpoint. Again, on this issue, we affirm the summary judgment of the district court.

III

Finally, Steinburg contends that the district court abused its discretion in denying his motion to file an amended complaint to assert claims against the commissioners in their individual capacities, to challenge the Commission's time, place, and manner regulations, and to add Officer Profita as a defendant.

The district court denied Steinburg's motion, noting that Steinburg had failed to show good cause for modifying the scheduling order established under Federal Rule of Civil Procedure 16(b)(4) and that, in any event, to grant the motion would be an act of futility because Steinburg's proposed amended complaint would not survive summary judgment. The court made this assessment after discovery in the case had been fully completed and after the court had assessed Steinburg's claims on the merits.

Of course the general rule is that leave to amend a complaint under Federal Rule of Civil Procedure 15(a)

should be freely given, *see Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), unless "the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile," *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (internal quotation marks omitted). A district court's decision to deny a motion to amend is reviewed for abuse of discretion. *See Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 476 (4th Cir. 2006).

Steinburg has pointed to no material in his proposed amended complaint that would have changed the analysis conducted by the district court in the context of the developed record, on which the court entered summary judgment against him. His proposed additional claims were still based on the events of the meeting on October 18, 2005, in which the defendants cut off his presentation and excluded him from the Commission meeting. Recognizing that discovery was fully completed and the district court had an excellent view of the potential claims, we can find no basis for concluding that the district court abused its discretion.

The judgment of the district court is

*AFFIRMED.*

Civil Action No. 3:06cv248

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
RICHMOND DIVISION

ROBERT C. STEINBURG,
Plaintiff,

v.

CHESTERFIELD COUNTY PLANNING COMMISSION; DANIEL GECKER, in his Official Capacity; and SHERMAN W. LITTON, in his Official Capacity,
Defendants.

February 1, 2007, Decided

February 1, 2007, Filed

COUNSEL: For Robert C. Steinburg, Plaintiff: James Broome Thorsen, LEAD ATTORNEY, Thorsen & Scher LLP, Richmond, VA.

For Chesterfield County Planning Commission, Daniel Gecker, in his official capacity, Sherman W. Litton, in his official capacity, Defendants: Stylian P. Parthemos, LEAD ATTORNEY, Jeffrey Lee Mincks, Steven Latham Micas, Chesterfield County Attorney's Office, Chesterfield, VA.

JUDGES: Robert E. Payne, United States District Judge.

## MEMORANDUM OPINION

This matter is before the Court on the Revised Motion for Summary Judgment filed by Defendants Daniel Gecker, Sherman Litton, and the Chesterfield County Planning Commission (Docket No. 28), and the Motion for Partial Summary Judgment filed by the Plaintiff, Robert Steinburg (Docket No. 9). For the reasons set forth below, the Plaintiff's motion is denied, and the Defendants' motion is granted in part.

### I. Procedural Posture And Statement Of Facts

Pursuant to 42 U.S.C. § 1983, Robert Steinburg filed this action against the Chesterfield County Planning Commission ("Commission"), Commission Chairman Sherman Litton in his official capacity, and Commission member Daniel Gecker in his official capacity. Steinburg alleges that the Defendants deprived him of the right to free speech guaranteed by the First Amendment to the United States Constitution during a Commission meeting held on October 18, 2005. Steinburg and the Defendants have each moved for summary judgment.

The incident that led to this action was recorded on videotape, so the actual conduct that forms the basis for Steinberg's case is not subject to dispute. On October 18, 2005, Steinburg attended a regular meeting of the Commission, during which members of the public were afforded the opportunity to express their opinions on zoning issues on the Commission's agenda. One item on the agenda was a proposed zoning change related to the Tarrington Subdivision. When that agenda item was

called, an attorney representing Tarrington's developers, William Shewmake, asked to defer the rezoning hearing for 30 days. [1]

After Shewmake made his request, Litton, Chairman of the Commission, opened the floor for public comment on the deferral request. Litton made it clear that the deferral was the only topic open for discussion at that point in the meeting. Three citizens in the audience took advantage of the opportunity to speak: Steinburg, who spoke third, and two other community members who spoke before him. Just before the first speaker began her presentation, Litton reiterated that discussion was to be "just on the deferral," and not on other topics.

Although the first speaker referred to the deferral throughout her presentation, most of her comments addressed safety issues related to the proposed rezoning request. Specifically, she feared that development undertaken pursuant to the proposed rezoning would occur atop a dangerous network of abandoned mine shafts. Notwithstanding that the first speaker did not confine her comments to the deferral request, the Commission allowed her to make the substantive presentation without interruption, and one Commission member even asked her several safety-related, substantive questions upon conclusion of her prepared remarks.

The second speaker, like the first, mentioned the deferral in passing, but also made a lengthy substantive presentation about safety issues related to the proposed rezoning. Midway through the second speaker's presentation, Gecker, a member of the

Commission, interrupted the speaker to ask whether or not the speaker was in favor of the deferral. Litton, the Chairman, also interjected, reminding the speaker that he would have an opportunity to present substantive remarks at a later date (apparently assuming that the hearing would in fact be deferred). After Litton's reminder, the second speaker promised to "shut up" after just a few more substantive comments. No Commission member objected, and the second speaker continued his substantive remarks for a short while before finally finishing.

After the second speaker finished, Gecker recalled to the podium Shewmake, the Tarrington developers' attorney, and asked him to address the safety concerns expressed by the previous two speakers. Gecker acknowledged that he was going to question Shewmake about matters unrelated to the deferral, but expressed the view that he was entitled to do so because Litton had allowed the previous two speakers to stray off topic and to address matters of substance respecting safety. Gecker then proceeded to ask Shewmake questions calculated to provide responses to the safety concerns raised by the first two speakers.

When Gecker finished questioning Shewmake, Steinburg came to the podium. What follows is a partial transcript of the exchange between Steinburg and members of the Commission. The transcript begins after Steinburg made several introductory comments unrelated to the deferral:

> MR: STEINBURG: Now I understand that you're not making a decision as it relates to this particular issue this evening, but I think it is

very, very important to apprise you, if you are not already aware, that this is an issue that people - it's a very volatile issue. I have lived in this corridor for thirty years, and I can tell you I haven't seen people this hot about anything like this, ever. This is a very serious issue.

One of the things that troubles me when some of these things are being presented this evening is a lot of bandying about, back and forth, by some of you, who don't seem to be paying attention, or else are talking about something that perhaps might not even be related, and I can tell you that perception is reality in the eyes of many. What you are talking about, I have no idea - Mr. Gecker, you in particular, leaning over and saying this, that, and the other thing - but I can tell you from a perception standpoint from someone who is concerned, like myself and others in this room, it's not very flattering, believe me.

MR. GECKER: Mr. Steinburg, abusing this podium is not very flattering.

MR. STEINBURG: That is not abusing the podium, Sir. I am telling you what I observed. I am a citizen. I am representing 600 households here at their bequest [sic] tonight, and you will listen to what I am saying, Sir.

MR. GECKER: No, Sir, you will not talk to me that way. I am not going to listen to what you've got to say on a deferral motion when you come

and speak to something other than the deferral. The Old Gun Road Civic Association –

MR. STEINBURG: That is with regard to deferral, Sir –

MR. GECKER: - supported the Tarrington –

MR. STEINBURG: Mr. Gecker, would you please give me the right to speak? Who do you think you are?

MR. LITTON: I'm going to cut you off. I'm Chairman, I can cut you –

MR. STEINBURG: Mr. Litton, yes, you can. You can do that.

MR. LITTON: And I am. This has gone way past, I've given you the courtesy. This is nothing but a deferral. This has nothing to do with the case. So just please sit down.

MR. STEINBURG: I'm not sitting down. I'm not done talking yet. Ask Kirk Turner, he knows me. I'm not a wild citizen.

MR. GECKER: Is there a -- Mr. Turner, is that right?

MR. STEINBURG: Let me speak.

MR. LITTON: I, you know, I've heard enough on this case tonight, I'm going to cut it off.

MR. STEINBURG: Can you tell me why you are cutting it off?

MR. LITTON: Because it is strictly a deferral and we're not arguing the case tonight. The case will be discussed at some time, at a later time. If you are telling me that you are in favor of the deferral, that is all I need to know. If you don't want the deferral, then you can argue –

MR. STEINBURG: You don't want any background information on anything. It sounds to me like you people have already make up your mind as to what you're going to do.

MR. LITTON: I don't need the information tonight because I'm going to hear the case again next month.

MR. STEINBURG: I understand that, Sir. All I'm asking for is respect from you. I'll give you respect, you give me respect. That's all I want.

MR. LITTON: I'm asking you just to sit down please.

MR. STEINBURG: I know you are. I understand what you're doing. And when I'm through speaking I'll sit down.

MR. LITTON: No, I think you're going to sit down now.

MR. STEINBURG: I'm not.

(Video Recording of Chesterfield County Planning Commission Meeting, October 18, 2005.) After this exchange, Litton asked Chesterfield County Police Officer James Profita to ask Steinburg to sit down. [2] Profita told Steinburg to sit down because he was engaging in disorderly conduct. Steinburg refused to sit down and was escorted from the podium by Profita and another officer, each of whom held Steinburg by an arm. After being removed from the podium, Steinburg was arrested for disorderly conduct, but the charges were later *nolle prosequied* at the request of Gecker and Litton. (Defs.' Mot. for Summ. J. at 6 n.7; Litton Dep. 102:11-103:7, Oct. 12, 2006.)

At the time Steinburg was forced from the podium, the Commission's Suggested Practices contained a rule prohibiting anyone from making "personal attacks" while speaking in Commission meetings. (Defs.' Mem. Supp. Summ. J. at 14 n.12.) Although that rule was not directly referenced by anyone on the night that this incident occurred, Gecker mentioned it while describing the incident in an email sent on October 27, 2005. (Pl.'s Br. in Resp. to Defs.' Revised Mot. for Summ. J. Ex. A.) Specifically, Gecker told a community member that, in addition to speaking off topic, Steinburg "launched into a personal attack (also prohibited by our rules)." (Id.) The Commission rescinded the policy prohibiting personal attacks on April 18, 2006. (Defs.' Mem. Supp. Summ. J. at 14 n.12.)

Four months after this incident, Steinburg filed this action under § 1983, claiming a violation of his First Amendment right to free speech. Steinburg seeks compensatory and punitive damages from each of the Defendants, and injunctive relief to prevent the

Commission from enforcing its policy prohibiting personal attacks. The Defendants filed a Motion for Summary Judgment on May 31, 2006 (Doc. No. 6), and Steinburg filed a Motion for Partial Summary Judgment on June 14, 2006 (Doc. No. 9). A hearing on those motions was held on September 6, 2006. During a conference call on September 21, 2006, Steinburg's counsel clarified that he was suing Litton and Gecker in their official capacities and, one week later, the Defendants filed a Revised Motion for Summary Judgment (Doc. No. 28), which addresses more directly the official capacity claims.[3] The Defendants argue that Steinburg suffered no constitutional injury, that Steinburg's request for injunctive relief is moot, and that the official capacity claims against Litton and Gecker must be dismissed.

## II. Steinburg's Prayer For Injunctive Relief

Steinburg has asked for injunctive relief to prevent the Commission from implementing its policy prohibiting personal attacks during public meetings. Because that policy has been rescinded by the Commission, the issue is moot, rendering injunctive relief neither necessary nor available.

## III. Official Capacity Claims Against Litton and Gecker

Litton and Gecker originally sought summary judgment based on qualified immunity but, because Steinburg has clarified that his suit is against Litton and Gecker in their official capacities only, the defense of qualified immunity is unavailable to *Litton and Gecker.* [4] Kentucky v. Graham, 473 U.S. 159, 166-67, 105

S. Ct. 3099, 87 L. Ed. 2d 114 (1985); *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006). Litton and Gecker now urge that the official capacity claims against them be dismissed because those claims are indistinguishable from the claim against the Commission. (Defs.' Mem. in Supp. of Revised Mot. for Summ. J. at 3.)

Individual-capacity suits seek to impose personal liability on government officials, but official-capacity suits, "in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky v. Graham*, 473 U.S. at 159 (internal citations omitted). If the governmental entity "receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id.* at 166. Therefore, if a plaintiff files suit against both a governmental entity and against that entity's officials in their official capacities, the suits against the government officials are duplicative, and may be dismissed as such. *See Hicks v. Halifax County Bd. of Educ.*, 93 F. Supp. 2d 649, 667 (E.D.N.C. 1999) (dismissing claims against school board members in their official capacities as being identical to the claims against the school board itself). Accordingly, the claims brought by Steinburg against Litton and Gecker in their official capacities, being conceptually identical to the claim against the Commission itself, are dismissed without prejudice.

## IV. Steinburg's Claim Against The Commission

The only remaining claim is against the Commission

itself. Steinburg brings this action under 42 U.S.C. § 1983, which provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law.

Section 1983 is not itself a source of substantive rights; rather, it provides a procedural vehicle for vindicating rights conferred by the United States Constitution or federal statute. *See Albright v. Oliver*, 510 U.S. 266, 271, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). A municipality or other local governmental body, which, of course, is a "person" under § 1983, may be held liable under that Section only if the plaintiff can "identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Bd. of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). Therefore, to hold the Commission liable under § 1983, Steinburg must identify a constitutional injury, a policy attributable to the Commission, and a causal relationship between that policy and the claimed injury. Believing those issues to be ripe for resolution, Steinburg and the Commission have each moved for summary judgment as to the Commission's liability.

## A. Summary Judgment Analysis

The standards of review applicable to summary judgement motions are well-established. Summary judgment is proper only when there are no genuine

issues as to any material facts and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is material when proof of its existence or nonexistence would affect the outcome of the case, and an issue is genuine if a reasonable jury might return a verdict in favor of the nonmoving party on the basis of such issue. *Id.*

In making a summary judgment determination, the Court may rely upon "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Fed. R. Civ. P. 56(c). The Court must view the facts and any reasonable inferences drawn from these facts in the light most favorable to the nonmoving parties. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Whether a factual inference is reasonable "cannot be decided in a vacuum; it must be considered 'in light of the competing inferences' to the contrary." *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 818 (4th Cir. 1995) (citing *Matsushita*, 475 U.S. at 588).

The nonmoving party is entitled to have his version of all that is disputed accepted, all conflicts resolved in his favor, and to have the benefit of all favorable legal theories invoked by the evidence. *M & M Medical Supplies and Serv. Inc. v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160, 163 (4th Cir. 1992). The party who bears the burden of proof on an issue at trial, however, cannot survive summary judgment without sufficient evidence to sustain his or her burden of proof on that point. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.

Ct. 2548, 91 L. Ed. 2d 265 (1986). These precepts and standards govern the resolution of the motions for summary judgment in this action.

**B. The Commission's Motion For Summary Judgment**

The Commission's Motion for Summary Judgment will be considered first. As noted above, to hold the Commission liable under § 1983, Steinburg must identify a constitutional injury, a policy attributable to the Commission, and a causal relationship between that policy and the injury. With the facts and all reasonable inferences drawn in his favor, Steinburg must muster enough evidence to survive summary judgment on each component of his claim.

**1. Injury**

Steinburg seeks to hold the Commission accountable for the actions of Litton and Gecker, and argues that Litton and Gecker, in causing injury to Steinburg, implemented the Commission's policy prohibiting personal attacks. (See Pl.'s Br. in Resp. to Defs.' Revised Mot. for Summ. J. at 5-11.) For purposes of analyzing the Commission's motion for summary judgment, the Court will assume, *arguendo*, that Steinburg could produce enough evidence to survive summary judgment with respect to his alleged constitutional injury. However, in a separate Memorandum Opinion respecting Steinburg's Motion to Amend Complaint and to Add New Party Defendant (Docket No. 38), the Court has concluded that Steinburg could not establish facts sufficient to support a jury finding of constitutional injury at the hands of

Litton and Gecker.

**2. Policy Attributable To The Commission**

To hold the Commission liable for the actions of Gecker and Litton, Steinburg also must demonstrate that, in terminating Steinburg's speech, Gecker and Litton were executing a policy attributable to the Commission. Steinburg contends that Gecker and Litton were implementing the Commission's then-existing policy prohibiting personal attacks when they acted to remove Steinburg from the podium. [5] Because the Commission does not dispute that the policy was in place on October 18, 2005, Steinburg easily meets the requirements of summary judgment as to the existence of a Commission policy that might have caused his alleged injury. [6]

**3. Causation**

Assuming, *arguendo*, that Steinburg could produce evidence of a constitutional injury in addition to the existence of a Commission policy that might have authorized that precise injury, he also must demonstrate "a direct causal link between the [policy] and the deprivation of federal rights." *Brown*, 520 U.S. at 404 (emphasis added). This causal link is required by the plain language of § 1983, which exposes to liability only a municipality that, through one of its policies, "subjects, or causes to be subjected" a citizen to the deprivation of a constitutional right. In Monell v. Dep't of Soc. Services of the City of New York, the United States Supreme Court stated explicitly that only "when execution of a government's policy . . . inflicts the injury [is] the government as an entity is responsible under § 1983." Id. (emphasis added). Therefore, proof of the

Commission policy's implementation is required to prove causation here. [7]

Because no one explicitly referenced the Commission policy the night this incident occurred, Steinburg has no direct evidence that the policy actually animated any decision to restrict his speech. Therefore, Steinburg's argument rests on the inference that, because Steinburg's comments to Gecker arguably can be characterized as a "personal attack," Steinburg was ultimately silenced because of the Commission's then-existing policy prohibiting such personal attacks. On the facts presented here, Steinburg cannot adduce enough evidence to support that inference.

Steinburg's best evidence from the incident itself is Gecker's initial warning to Steinburg that he was "abusing [the] podium." Given Gecker's October 27, 2005 email, in which, retrospectively, he described Steinburg's comments as a "personal attack" prohibited by Commission rules, Steinburg is entitled to the reasonable inference that Gecker had in mind the now-rescinded Commission policy prohibiting personal attacks when he told Steinburg he was "abusing [the] podium." [8] Nevertheless, that evidence is insufficient to prove that Steinburg was silenced because of the policy. First, it was Litton, not Gecker, who actually restricted Steinburg's speech, and he did so after repeatedly informing all speakers that the topic to be addressed was the request for deferral. Second, in addressing Steinburg, Litton made no statement that reasonably could be inferred to mean that the restriction of Steinburg's speech by Litton was animated by the Commission's policy. Indeed, Litton consistently maintained that he was silencing Steinburg for

speaking off topic. [9] Thus, even though it is permissible to infer that Gecker's conduct was grounded in the Commission's now-rescinded policy, Steinburg would have no viable claim because it was Litton, not Gecker, who actually restricted Steinburg's speech. [10]

Steinburg has adduced no evidence that would allow a jury reasonably to find a direct causal link between the Commission policy and Steinburg's injury. Hence, summary judgment for the Commission is required.

**C. Steinburg's Motion For Partial Summary Judgment**

The same record and the same considerations that warrant summary judgment for the Commission compel a denial of Steinburg's motion for partial summary judgment.

**CONCLUSION**

For the reasons stated above, Steinburg's claims against Litton and Gecker are dismissed without prejudice and Steinburg's Motion for Partial Summary Judgment will be denied. The Commission's Motion for Summary Judgment will be granted.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

Robert E. Payne

United States District Judge

Richmond, Virginia

Date: February 1, 2007

Footnotes

1 Under the Commission's Suggested Practices and Procedures, a request for deferral is to be made in writing at least three days before the meeting. (See Aff. of Linda Lewis, Ex. B at 2.) For reasons neither explained nor readily apparent, this procedure was not followed. The failure to follow the prescribed protocol is mentioned in Steinburg's papers but the failure is not a component of his claim. (See Mem. in Supp. of Pl.'s Mot. for Partial Summ. J. at 5.)

2 Profita entered the hearing room after Commission Member Kirk Turner pressed a panic button sometime during the exchange between Steinburg and Litton. (See Turner Dep. 91:23-92:10, Oct. 5, 2006; Profita Dep. 7:24-8:4, Oct. 5, 2006.) Turner thought the meeting was "out of control" at that point. (Turner Dep. 92:5.)

3 Steinburg also filed a Motion to Amend Complaint and to Add New Party Defendant (Docket No. 38) on November 1, 2006. That motion is addressed in a separate Memorandum Opinion.

4 While the style of Steinburg's complaint indicates only an official capacity suit against Litton and Gecker, the body of the complaint offers some evidence that Steinburg intended to sue Litton and Gecker in their individual capacities, and the parties themselves seemed to treat this as an individual capacity suit. However, during a conference call on September 21,

2006, Steinburg's counsel answered in the affirmative when the Court asked him directly if this was an official capacity suit rather than an individual capacity suit. (See Pl.'s Mem. in Supp. of Mot. to Amend Compl. at 2.) Because, at the time, Steinburg's counsel fully understood the legal implications of his response, the Court has treated this as an official capacity suit, in keeping with the reasoning of *Atchinson v. District of Columbia*, 315 U.S. App. D.C. 318, 73 F.3d 418, 424-28 (D.C. Cir. 1996). After reflecting on the matter further, Steinburg moved to amend the complaint in order to sue Litton and Gecker in their individual capacities, as well as to add another defendant. As noted above, that motion is addressed separately.

5 Steinburg has not alleged that either Litton or Gecker is a "policymaker" whose unilateral actions alone might constitute policies attributable to the Commission. *See Pembaur v. Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).

6 It is worth noting that the Commission's policy prohibiting personal attacks was probably facially unconstitutional. A virtually indistinguishable school board policy was struck down as unconstitutional in *Bach v. School Board of the City of Virginia Beach*, 139 F. Supp. 2d 738 (E.D. Va. 2001). The Court need not decide that issue here, however.

7 Fundamentally, proof of the Commission policy's execution is necessary because § 1983 cannot be used to challenge municipal policies that have caused no injuries, even if those policies are facially unconstitutional. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986).

8 Gecker claims that "abusing [the] podium" was not directed at Steinburg at all, but was in reference to the two speakers who preceded Steinburg, both of whom failed to discuss the deferral. (Gecker Dep. 123:6-18, Oct. 12, 2006.) Gecker's explanation is not illogical in context (because Gecker had just been accused of not paying attention to the first two speakers), but the Court will construe the facts in the light most favorable to Steinburg, and will adopt the reasonable inference that "abusing [the] podium" was a reference to Steinburg's behavior.

9 In addition, nothing in Litton's deposition testimony would indicate that his actions were animated by the Commission's policy. Litton continued to justify his actions by arguing that Steinburg was speaking off topic. (Litton Dep. at 74-81.) Moreover, Litton did not consider Steinburg's remarks to Gecker to be "personal attacks," and it is not clear that Litton knew that the Commission's policies prohibited "personal attacks." (Id. at 14-17, 75:7.)

10 The tape discloses that Gecker reacted in an inappropriate way when his rude conduct was publicly addressed, but that is not a constitutional violation.

Civil Action No. 3:06cv248

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ROBERT C. STEINBURG,
Plaintiff,
v.
CHESTERFIELD COUNTY PLANNING COMMISSION; DANIEL GECKER, in his Official Capacity; and SHERMAN w. LITTON, in his Official Capacity,
Defendants.

## MEMORANDUM OPINION

This matter is before the Court on the Plaintiff's Motion to Amend Complaint and to Add New Party Defendant (Docket No. 38). For the reasons set forth below, the Plaintiff's motion is denied.

## I. Procedural Posture And Statement Of Facts

Pursuant to 42 U.S.C. § 1983, Robert Steinburg filed this action against the Chesterfield County Planning Commission ("Commission"), Commission Chairman Sherman Litton in his official capacity, and Commission member Daniel Gecker in his official capacity.[1] Steinburg alleges that, during a Commission meeting on October 18, 2005, the Defendants deprived him of the right to free speech guaranteed by the First Amendment to the United States Constitution. Steinburg and the Defendants have each moved for summary judgment, and Steinburg now moves to

amend his complaint to add a new defendant, Chesterfield County Police Officer James Profita, and to sue Litton and Gecker in their individual capacities.

The incident that led to this action was recorded on videotape, so the actual conduct that forms the basis for Steinberg's case is not subject to dispute. On October 18, 2005, Steinburg attended a regular meeting of the Commission, during which members of the public were afforded the opportunity to express their opinions on zoning issues on the Commission's agenda. One item on the agenda was a proposed zoning change related to the Tarrington Subdivision. During the meeting, however, an attorney representing Tarrington's developers, William Shewmake, asked to defer the rezoning hearing for thirty days.[2]

After Shewmake made his request, Litton, Chairman of the Commission, opened the floor for public comment on the deferral request. Litton made it clear that the deferral was the only topic open for discussion at that point in the meeting. Three citizens in the audience took advantage of the opportunity to speak: Steinburg, who spoke third, and two other community members who spoke before him. Just before the first speaker began her presentation, Litton reiterated that discussion was to be "just on the deferral," and not on other topics.

Although the first speaker referred to the deferral throughout her presentation, most of her comments addressed safety issues related to the proposed rezoning request. Specifically, she feared that development undertaken pursuant to the proposed rezoning would occur atop a dangerous network of

abandoned mine shafts. Notwithstanding that the first speaker did not confine her comments to the deferral request, the Commission allowed her to make the substantive presentation without interruption, and one Commission member even asked her several safety-related, substantive questions upon conclusion of her prepared remarks.

The second speaker, like the first, mentioned the deferral in passing, but also made a lengthy substantive presentation about safety issues related to the proposed rezoning. Midway through the second speaker's presentation, Gecker, a member of the Commission, interrupted the speaker to ask whether or not the speaker was in favor of the deferral. Litton, the Chairman, also interjected, reminding the speaker that he would have an opportunity to present substantive remarks at a later date (apparently assuming that the hearing would in fact be deferred). After Litton's reminder, the second speaker promised to "shut up" after just a few more substantive comments. No Commission member objected, and the second speaker continued his substantive remarks for a short while before finally finishing.

After the second speaker finished, Gecker recalled to the podium Shewmake, the Tarrington developers' attorney, and asked him to address the safety concerns expressed by the previous two speakers. Gecker acknowledged that he was going to question Shewmake about matters unrelated to the deferral, but expressed the view that he was entitled to do so because Litton had allowed the previous two speakers to stray off topic and to address matters of substance respecting safety. Gecker then proceeded to

ask Shewmake questions calculated to provide responses to the safety concerns raised by the first two speakers.

When Gecker finished questioning Shewmake, Steinburg came to the podium. What follows is a partial transcript of the exchange between Steinburg and members of the Commission. The transcript begins after Steinburg made several introductory comments unrelated to the deferral:

> MR: STEINBURG: Now I understand that you're not making a decision as it relates to this particular it is you, if this is a very in this can tell this hot about This is a very issue this evening, but I think very, very important to apprise you are not already aware, that an issue that people - it's volatile issue. I have lived corridor for thirty years, and I you I haven't seen people anything like this, ever. This is a very serious issue.
>
> One of the things that troubles me when some of these things are being presented this evening is a lot of bandying about, back and forth, by some of you, who don't seem to be paying attention, or else are talking about something that perhaps might not even be related, and I can tell you that perception is reality in the eyes of many. What you are talking about, I have no idea - Mr . Gecker, you in particular, leaning over and saying this, that, and the other thing - but I can tell you from a perception standpoint from someone who is concerned, like myself and others in this room, it's not very flattering, believe me.

MR. GECKER: Mr. Steinburg, abusing this podium is not very flattering.

MR. STEINBURG: That is not abusing the podium, Sir. I am telling you what I observed. I am a citizen. I am representing 600 households here at their bequest [sic] tonight, and you will listen to what I am saying, Sir.

MR. GECKER: No, Sir, you will not talk to me that way. I am not going to listen to what you've got to say on a deferral motion when you come and speak to something other than the deferral. The Old Gun Road Civic Association –

MR. STEINBURG: That is with regard to deferral, Sir –

MR. GECKER: - supported the Tarrington –

MR. STEINBURG: Mr. Gecker, would you please give me the right to speak? Who do you think you are?

MR. LITTON: I'm going to cut you off. I'm Chairman, I can cut you –

MR. STEINBURG: Mr. Litton, yes, you can. You can do that.

MR. LITTON: And I am. This has gone way past, I've given you the courtesy. This is nothing but a deferral. This has nothing to do with the case. So just please sit down.

MR. STEINBURG: I'm not sitting down. I'm not done talking yet. Ask Kirk Turner, he knows me. I'm not a wild citizen.

MR. GECKER: Is there a - Mr. Turner, is that right?

MR. STEINBURG: Let me speak.

MR. LITTON: I, you know, I've heard enough on this case tonight, I'm going to cut it off.

MR. STEINBURG: Can you tell me why you are cutting it off?

MR. LITTON: Because it is strictly a deferral and we're not arguing the case tonight. The case will be discussed at some time, at a later time. If you are telling me that you are in favor of the deferral, that is all I need to know. If you don't want the deferral, then you can argue –

MR. STEINBURG : You don't want any background information on anything. It sounds to me like you people have already make up your mind as to what you're going to do.

MR. LITTON: I don't need the information tonight because I'm going to hear the case again next month.

MR. STEINBURG: I understand that, Sir. All I'm asking for is respect from you. I'll give you respect, you give me respect. That's all I want.

MR. LITTON: I'm asking you just to sit down

please.

MR. STEINBURG: I know you are. I understand what you're doing. And when I'm through speaking I'll sit down.

MR. LITTON: No, I think you're going to sit down now.

MR. STEINBURG: I'm not.

(Video Recording of Chesterfield County Planning Commission Meeting, October 18, 2005.) After this exchange, Litton asked Chesterfield County Police Officer James Profita to ask Steinburg to sit down.[3] Profita told Steinburg to sit down because he was engaging in disorderly conduct. Steinburg refused to sit down and was escorted from the podium by Profita and another officer, each of whom held Steinburg by an arm. After being removed from the podium, Steinburg was arrested for disorderly conduct, but the charges were later *nolle prosequied* at the request of Gecker and Litton. (Defs.' Mot. for Summ. J. at 6 n.7; Litton Dep. 102:11103:7, Oct. 12, 2006.)

At the time Steinburg was forced from the podium, the Commission's Suggested Practices contained a rule prohibiting anyone from making "personal attacks" while speaking in Commission meetings. (Defs.' Mem. Supp. Summ. J. at 14 n.12.) Although that rule was not directly referenced by anyone on the night that this incident occurred, Gecker mentioned it while describing the incident in an email sent on October 27, 2005. (Pl.'s Br. in Resp. to Defs.' Revised Mot. for Summ. J. Ex. A.) Specifically, Gecker

told a community member that, in addition to speaking off topic, Steinburg "launched into a personal attack (also prohibited by our rules)." (Id.) The Commission rescinded the policy prohibiting personal attacks on April 18, 2006. (Defs.' Mem. Supp. Summ. J. at 14 n.12.)

Four months after this incident, Steinburg filed this action under § 1983, claiming a violation of his First Amendment right to free speech. Steinburg seeks compensatory and punitive damages from each of the Defendants, and injunctive relief to prevent the Commission from enforcing its policy prohibiting personal attacks. The Defendants filed a Motion for Summary Judgment on May 31, 2006 (Doc. No. 6), and Steinburg filed a Motion for Partial Summary Judgment on June 14, 2006 (Doc. No. 9). A hearing on those motions was held on September 6, 2006. During a conference call on September 21, 2006, Steinburg's counsel clarified that he was suing Litton and Gecker in their official capacities and, one week later, the Defendants filed a Revised Motion for Summary Judgment (Doc. No. 28), which addresses more directly the official capacity claims.

On November 1, 2006, approximately three weeks after the deposition deadline, Steinburg filed this Motion to Amend Complaint and to Add New Party Defendant (Docket No. 38). Steinburg seeks to amend his complaint to sue Litton and Gecker in their individual capacities, and to add Officer Profita as a new defendant. The Defendants oppose Steinburg's motion, arguing that it is untimely under the Court's Scheduling Order (Doc. No. 5), and that amendment would be prejudicial and futile, and that the motion is made in bad faith.

## II. Discussion

The Scheduling Order in this action required motions for joinder of additional parties or amendment of pleadings to be filed within fifteen days of the Order's entry. (See Scheduling Order at 1.) The Order was entered on May 19, 2006, and this Motion to Amend was filed months after the fifteen day period had passed.

"While a motion to amend a complaint after the deadline in a scheduling order triggers Rule 15(a) concerning liberal amendment of pleadings, it also triggers Rule 16(b) governing modifications to a scheduling order." Odyssey Travel Ctr., Inc. v. RO Cruises, Inc., 262 F. Supp. 2d 618, 631 (D. Md. 2003). Rule 16(b) of the Federal Rules of Civil Procedure directs that scheduling orders "shall not be modified except upon a showing of good cause and by leave of the district judge." While "neither the Supreme Court nor the Fourth Circuit has dealt decisively with the interplay" between Rules 15 (a) and 16 (b) in a case like this where "a motion to amend is filed after the deadline set in a scheduling order has passed," district courts in this circuit engage in a two step analysis. Id. First, courts require the moving party to satisfy the "good cause" standard of Rule 16(b); if that standard is satisfied, then, second, the movant must satisfy the standards of Rule 15(a). Id.

The good cause standard of Rule 16(b) "focuses on the timeliness of the amendment and the reasons for its tardy submission." Id. at 631-32. The movant bears the burden of demonstrating that the reasons for his tardiness justify a departure from the Scheduling

Order. Id. at 632. Thus, "[t]he primary consideration of the Rule 16(b) `good cause' standard is the diligence of the movant. " Id. If the movant was not diligent, "the inquiry should end." Marcum v. Zimmer, 163 F.R.D. 250, 254 (S.D. w. Va. 1995).

Here, Steinburg makes no effort to satisfy the good cause standard of Rule 16(b). However, insofar as his motion seeks to amend the complaint with respect to Litton and Gecker, the Court perceives no fatal lack of diligence. While Steinburg's counsel could certainly have been more timely in filing his Motion to Amend, the Court is not prepared on this record to find that the delay evidences a lack of diligence that would foreclose actions against Litton and Gecker, personally.

On the other hand, Steinburg was not at all diligent in seeking to amend the complaint to add Profita as a defendant. Nothing during the past several months has kept Steinburg from deposing Profita or otherwise conducting further investigation into the cause of Steinburg's arrest during the Commission meeting. Steinburg has known that Profita arrested Steinburg since the beginning of this action. Indeed, Profita's actions are captured on videotape. It is far too late in the day to add Profita as a defendant, and this smacks of a "last-second amendment[] alleging meritless claims in an attempt to save a case from summary judgment." United States Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n., 873 F.2d 731, 736 n.4 (4th Cir. 1989). Therefore, Steinburg's motion to add Profita as a defendant is denied.

The Court is left, then, to decide Steinburg's Motion to Amend with respect to Litton and Gecker.

Having survived Rule 16(b) analysis, Steinburg's motion must now be considered in light of Rule 15 (a). Under Rule 15 (a), leave to amend a complaint "shall be freely given when justice so requires." Accordingly, motions to amend "should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." Johnson v. Orowheat Foods Co., 785 F.2d 503, 509 (4th Cir. 1986).

It has been noted that "[t]here is some confusion in this circuit as to what standard the court should apply in determining whether an amendment is futile." Schieszler v. Ferrum College, 233 F. Supp. 2d 796, 804-05 (W.D. Va. 2002). The Fourth Circuit instructs that leave "should be denied on the ground of futility when the proposed amendment is clearly insufficient or frivolous on its face," Johnson, 785 F.2d at 510, or when "a proposed amendment may clearly be seen to be futile because of substantive or procedural considerations," Davis v. Piper Aircraft Corp., 615 F. 2d 606, 613 (4th Cir. 1980). At least one court has determined that a futile amendment is one that cannot survive a motion for summary judgment, see Adkins v. Labor Ready, Inc., 205 F.R.D. 460, 462 (S.D. W. Va.2001) , but others have used Rule 12(b)(6) as the standard, see, e. g., Schiesler, 233 F. Supp. 2d at 805; Burns v. AAF-McQuay, Inc., 890 F. Supp. 175, 179 (W. D. Va. 1997).

While the Fourth Circuit has not clarified whether a specific standard, be it summary judgment or Rule 12(b)(6). is appropriate, the Court of Appeals has approved denying leave to amend on the basis of futility where an amendment would not survive summary judgment. See United States Dev. Corp., 873

F.2d at 736 n.4 (explaining that courts should deny motions to amend on grounds of futility rather than grant an amendment that clearly will not survive summary judgment). This accords with the rule in other circuits. See, e. q ., Bethany Pharmacal Co., Inc. v. QVC, Inc., 241 F.3d 854, 861 (7th Cir. 2001) ("An amendment is futile if the added claim would not survive a motion for summary judgment."); Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2nd Cir. 2001) (summary judgment is standard for "futility" where summary judgment issue has been fully briefed) .

Here, the Court is faced with an unusual situation in which the parties each have fully briefed the issue of summary judgment as if this were an individual capacity suit against Litton and Gecker, even though, as explained above, the suit was actually filed against Litton and Gecker in their official capacities. Thus, the Court is in a position to determine the substantive merits of individual capacity claims against Litton and Gecker, and, as this case presents itself, the Court will not be engaging in mere "conjecture about the merits of the litigation" at too early a stage. Davis, 615 F.2d at 613.

On the facts presented, Steinburg's motion must be denied as futile because individual capacity suits against Gecker and Litton would fail on summary judgment.

**A. Steinburg' s § 1983 Claim**

Steinburg brings this claim under 42 U.S.C. § 1983, which provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution ... shall be liable to the party injured in an action at law.

Section 1983 is not itself a source of substantive rights; rather, it provides a procedural vehicle for vindicating rights conferred by the United States Constitution or federal statute. See Albright v. Oliver, 510 U.S. 266, 271 (1994). Steinburg contends that his First Amendment rights were violated when he was removed from the podium while making comments critical of Gecker and the Commission. Therefore, to analyze the potential liability of Litton and Gecker under § 1983 (in order to determine whether amendment of the complaint would be futile), the Court must (1) determine whether Steinburg might have suffered constitutional injury, and (2) whether Litton and Gecker may be responsible for inflicting it.

**1. Alleged Injury**

When a First Amendment claim is asserted, a court must begin its analysis by determining whether the plaintiff engaged in protected speech. Am. Civil Liberties Union, Student Chapter - Univ. of Md.,Coll. Park v. Mote, 423 F. 3d 438, 442 (4th Cir. 2005). The First Amendment affords the broadest protection to political expression. Bach v. Sch. Bd. of the City of Virginia Beach, 139 F. Supp. 2d 738, 743 (E.D. Va. 2001) (citing Roth v. United States, 354 U.S. 476, 484 (1957)). Political expression includes speech on matters of

"public importance," and, more specifically, includes criticism of community leaders during formal public meetings. Bach, 139 F. Supp. 2d at 743 (finding First Amendment protection for critical statements about school board members made during school board meetings). Here, no party disputes that Steinburg's comments, both about the Tarrington development project and the behavior of the Commission members, constituted protected speech.

If a First Amendment claim involves protected speech, as is the case here, a court must next identify the nature of the forum in which the speech occurred. Mote, 423 F.3d at 442. Speech may permissibly be limited by the government, but the extent of the permissible limitations (called time, place, and manner restrictions) is determined by the nature of the forum. The Supreme Court of the United States has identified at least four kinds of fora: the traditional public forum, the non-public forum, the designated public forum, and the limited public forum. Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch.,457 F.3d 376, 382 (4th Cir. 2006). The parties here agree that the speech at issue took place in a limited public forum.[4]

In a limited public forum, "the government may restrict access to `certain groups' or to `discussion of certain topics'" so long as the restrictions are "both reasonable and viewpoint neutral." Child Evangelism Fellowship, 457 F.3d at 382 (citing Good News Club v. Milford Cent. Sch., 533 U. S. 98, 106-07 (2001)). Whether a restriction is "reasonable" depends on the "purpose served by the forum," Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995), but it has long been established that "public bodies may

confine their meetings to specified subject matter," City of Madison v. Wis. Employment Relations Comm'n,429 U.S. 167,176 n.8 (1976). The additional requirement of viewpoint neutrality prohibits the government from regulating speech based not on its subject matter but on "its message." Rosenberger, 515 U.S. at 828. For example, in some limited public fora it is unconstitutional not to allow religious speech from a Christian perspective when religious speech from a scholarly perspective is permitted. See id. at 831. Any viewpoint based restrictions are "presumed to be unconstitutional." Id. Moreover, if a restriction discriminates based on viewpoint, it is unnecessary to determine whether that restriction was otherwise reasonable under the limited public forum doctrine. See Good News Club, 533 U.S. at 107 (stopping limited public forum analysis once viewpoint discrimination had been established).

Thus, as Steinburg correctly argues, his First Amendment rights were violated if he was cut off because he was expressing a critical viewpoint, even though he could permissibly have been cut off for speaking off topic or for otherwise disrupting the meeting.[5] See Collinson v. Gott, 895 F.2d 994, 1000, 1011 (4th Cir. 1990) (Phillips, J. and Butzner, J., in a divided opinion, separately finding that the president of a county board of commissioners could be liable under 42 U.S.C. § 1983 for silencing a speaker because of his viewpoint, even though the speaker could permissibly have been silenced for other reasons). Therefore, if Litton or Gecker are to be held liable for violating Steinburg' s First Amendment rights, Steinburg must be able to demonstrate that:(1) Steinburg's speech was restricted by the person to be held liable; and (2) the

restriction was imposed because of the viewpoint Steinburg was expressing. If Steinburg cannot adduce enough evidence to survive summary judgment on those points, his motion to amend must be denied as futile.

**2. Would Individual Capacity Suits Against Litton, and Gecker Survive Summary Judgment?**

The standards of review applicable to summary judgment motions are well-established. Summary judgment is proper only when there are no genuine issues as to any material facts and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is material when proof of its existence or nonexistence would affect the outcome of the case, and an issue is genuine if a reasonable jury might return a verdict in favor of the nonmoving party on the basis of such issue. Id.

In making a summary judgment determination, the Court may rely upon "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Fed. R. Civ. P. 56 (c). The Court must view the facts and any reasonable inferences drawn from these facts in the light most favorable to the nonmoving parties. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp. , 475 U.S. 574, 587-88 (1986). Whether a factual inference is reasonable "cannot be decided in a vacuum; it must be considered `in light of the competing inferences' to the contrary." Sylvia Dev. Corp. v. Calvert County, Md., 48 F.3d 810, 818 (4th Cir. 1995)(citing Matsushita, 475 U.S. at 588).

The nonmoving party is entitled to have his version of all that is disputed accepted, all conflicts resolved in his favor, and to have the benefit of all favorable legal theories invoked by the evidence. M & M Medical Supplies and Serv. Inc. v. Pleasant Valley Hospital, Inc., 981 F . 2d 160, 163 (4th Cir. 1992). The party who bears the burden of proof on an issue at trial, however,cannot survive summary judgment without sufficient evidence to sustain his or her burden of proof on that point. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). These precepts and standards will guide the Court's evaluation of the evidence supporting individual capacity suits against Litton and Gecker.

**a. Gecker's Role in the Alleged Deprivation**

The Defendants contend that only Litton was responsible for silencing Steinburg during the Commission meeting. (See Defs.' Mot. for Summ. J. at 12-13.) Steinburg, on the other hand, argues that Gecker and Litton were both responsible for Steinburg's alleged injury. (See Mem. in Supp. of Pl.'s Mot. for Partial Summ. J. at 28.) Specifically, Steinburg alleges that Gecker "actively participated in the deprivation" of Steinburg's rights. (Id. (citing Wright v. Collins,766 F. 2d 841(4th Cir. 1985) .) However, a careful review of the videotape reveals that Steinburg's speech was not restricted until Litton told Steinburg that he was going to "cut [him] off" and then subsequently asked him to "please sit down." Gecker personally took no action that can reasonably be construed as depriving Steinburg of his right to speak at that meeting.

While individual comments made by Gecker could, in isolation, arguably be interpreted as attempts to restrict Steinburg's speech, the entire exchange between Gecker and Steinburg, viewed in context, amounts only to an argument between the two men. Steinburg accused Gecker of being inattentive during the first two presentations, and Gecker responded by arguing that he did not need to pay attention to speakers who were not addressing the deferral. Gecker might have been better served had he not attempted to defend his rude behavior, but his decision to argue with Steinburg does not amount to a constitutional violation. No reasonable jury could conclude otherwise on the facts presented here.[6]

Steinburg points to two comments by Gecker that, in Steinburg's view, constituted an effort to stifle Steinburg' s viewpoint. (See Mem. in Supp. of Pl.'s Mot. for Partial Summ. J. at 26.) First, Gecker told Steinburg that "abusing [the] podium [was] not very flattering." Second, shortly thereafter, Gecker said to Steinburg: "you will not talk to me that way."

After Steinburg singled out Gecker and told him that his lack of attentiveness during the previous two presentations was "not very flattering," Gecker responded to Steinburg's criticism by telling him that "abusing [the] podium [was] not very flattering." Steinburg is entitled to the reasonable inference that Gecker's comment was animated by the now-rescinded Commission policy prohibiting personal attacks, particularly in light of Gecker's October 27, 2005 email, in which, retrospectively, he described Steinburg's comments as a "personal attack" prohibited by Commission rules. However, it is not permissible also to

infer that Gecker silenced Steinburg or caused him to be silenced by telling him that he was "abusing the podium." Gecker did not tell Steinburg to "stop abusing [the] podium" or otherwise stop speaking on any topic, nor did Gecker interrupt Steinburg to make his comment (and, in that way, force Steinburg to stop speaking).

In response to Gecker's comment, Steinburg argued that no abuse of the podium had taken place, and told Gecker : "you will listen to what I am saying" Gecker replied, again without interrupting Steinburg: "No, Sir, you will not talk to me that way. I am not going to listen to what you've got to say on a deferral motion when you come and speak to something other than the deferral."[7] While Gecker's comment "you will not talk to me that way" could, in isolation, possibly be construed as an effort to prevent Steinburg from speaking, its context reveals it to be only Gecker's opinion that he would not be ordered by a community member to listen attentively to subjects not on the Commission's agenda. Gecker was merely attempting to justify the rude behavior that Steinburg had just pointed out, and it would be unreasonable to conclude otherwise after viewing the entire videotape of the Commission meeting.

In sum, Steinburg and Gecker were having a heated exchange that was not flattering to either man and that was precipitated by Gecker, but Gecker never restricted Steinburg's speech nor asked anyone else to do so. Steinburg accused Gecker of being inattentive and Gecker argued, in response, that he did not need to be attentive to speakers who were not addressing the deferral. Gecker may have been behaving rudely, but

after having listened to three successive speakers fail to address the deferral issue, it is not surprising that Gecker defended himself against accusations of inattentiveness by pointing out that none of the speakers had respected the ground rules for the agenda item by addressing only the topic of the deferral.[8]

After the exchange between Gecker and Steinburg had deteriorated into agitated shouting, Litton intervened, as he was empowered to do as chairman.[9] (See Aff. of Linda Lewis, Ex. A at 2.) However, no reasonable jury could conclude that Gecker, whose role was limited to a participant in an ugly argument, was the cause of Steinburg's alleged deprivation. Because Gecker was not the cause of Steinburg's alleged deprivation under § 1983, a suit against him on those grounds would not survive summary judgment; therefore, Steinburg may not amend his complaint to add a futile individual capacity suit against Gecker.[10]

**b. Litton's Role in the Alleged Deprivation**

No party disputes that Litton was responsible for silencing Steinburg. Litton's motivation is therefore the key consideration in determining whether Litton violated Steinburg's constitutional rights. For purposes of this analysis, it is instructive to consider Judge Phillips's analysis of an extremely similar factual situation in Collinson v. Gott, 895 F.2d 994 (4th Cir. 1990). Collinson involved a public meeting of the Board of Commissioners in Calvert County, Maryland to discuss the reorganization of the county government. 895 F.2d at 995. Collinson attended the meeting in order to speak about the reorganization, and was

afforded the opportunity to do so during a public comment period. Id. at 996. Collinson began his remarks by criticizing one of the Board members and, almost immediately, was called out of order by Gott, the Board president, for speaking off topic. Id. Gott then asked a police officer to escort Collinson from the podium, and, apparently, he was removed without incident. Id. at 997. Collinson was not arrested. Id.

Judge Phillips, along with Judge Butzner, determined that Gott could be liable under 42 U.S.C. § 1983 if he silenced Collinson to stifle his viewpoint on the government reorganization issue, but not if he was removed, as Gott claimed, to avoid disruption of the meeting. Id. at 1000, 1011. Judge Phillips then determined that Gott's actions could not reasonably be interpreted to have been motivated by hostility toward Collinson's viewpoint. Id. at 100203. Judge Phillips noted that Gott's immediate explanation for silencing Collinson was to prevent irrelevant discussion unrelated to the reorganization issue. Id. at 1002. Moreover, he did not silence subsequent speakers who offered viewpoints similar to those that Collinson apparently was going to express. Id. at 1002-03. In other words, Gott's words and deeds were consistent, and both reflected his desire to conduct an orderly meeting focused on the reorganization issue. Id. For those reasons, Judge Phillips decided that there was no genuine dispute about Gott's motive in silencing Collinson. Id at 1003.

The facts in this case are extremely similar to those presented in Collinson. Litton contends that his actions were taken to enforce a permissible subject matter restriction on Steinburg's speech, and that he

silenced Steinburg only because Steinburg was speaking off topic. In support, Litton notes that, throughout his exchanges with Steinburg, he explained that Steinburg was being silenced for speaking about something other than the deferral.

Steinburg, on the other hand, notes that Litton never cut off either of the people who spoke before Steinburg, even though they were speaking about safety concerns not strictly related to the deferral. Moreover, Litton indulged Gecker when he called the developers' attorney, Shewmake, back to the podium to address those same safety concerns. Given this factual context, Steinburg contends that a jury could reasonably infer that the stated reasons for silencing Steinburg were pretextual, and that Litton actually was motivated by a desire to curtail Steinburg's critical speech.

Because the central issue in this action can be decided only on the basis of factual inferences about Litton's motive in silencing Steinburg, the Court is mindful that the reasonableness of a factual inference "must be considered `in light of the competing inferences' to the contrary." Sylvia Dev. Corp., 48 F.3d at 818 (citations omitted). Given that directive, and considering this case in light of Collinson, the Court concludes that a reasonable jury could not find that Litton silenced Steinburg to suppress his viewpoint. Litton consistently stated that he was cutting Steinburg off in order to bring the meeting back on topic, and his actions were consistent with that motivation. By the time Litton interjected, Steinburg had finished his direct criticism of Gecker, and Steinburg and Gecker had argued back and forth until

Steinburg was essentially yelling at Gecker. At that point, given Litton's position of responsibility, the only sensible course was to intercede and prevent the meeting from degenerating into a shouting match that had nothing to do with the deferral issue. Thus, as in Collinson, Litton's words and deeds both were consistent with a motive to restore order to the meeting.

Without question, Litton allowed the two previous speakers wide latitude in discussing issues unrelated to the deferral, but Litton was no less patient with Steinburg. Litton did not immediately cut Steinburg off when he came to the podium and all but announced his intention to speak off topic ("Now I understand that you're not making a decision as it relates to this particular issue this evening, but. . . ") . Instead, Litton allowed Steinburg to continue his comments, then listened to Steinburg and Gecker argue back and forth for a short while before finally intervening to prevent total disruption of the meeting.

After Litton had taken control of the meeting, he offered Steinburg an additional opportunity to address the deferral, but by that time Steinburg was highly agitated, and interrupted Litton before he could finish giving Steinburg a second speaking opportunity. Litton's additional efforts to allow Steinburg an opportunity to address the deferral are evidence that he was motivated only to restore order to the meeting, not to single out Steinburg's particular viewpoint for suppression.

Thus, in light of all the possible inferences that could be drawn from Litton's conduct, the Court

concludes that a reasonable jury could not determine that Litton silenced Steinburg to stifle his viewpoint rather than to restore order to the meeting by focusing discussion on the deferral.

Like Gecker, Litton also argues that he is protected by qualified immunity. While the defense of qualified immunity is not necessary to protect Litton from suit based on viewpoint discrimination, Litton might successfully have relied on that defense had Steinburg argued that Litton's actions to remove Steinburg from the podium were not justifiable as a reasonable time, place, and manner restriction, even if motivated by viewpoint-neutral concerns.[11] while Steinburg makes no such argument, it is worth noting that public officials presiding over public meetings, as Litton was doing, are offered broad protection by the qualified immunity doctrine when they take action to maintain order. See Collinson, 895 F.2d at 1004. Here, Litton's stated reason for silencing Steinburg, reiterated during the meeting and in his deposition testimony, was to refocus the meeting on the deferral issue. His judgment about whether or not that action was necessary is accorded significant deference under Collinson. Therefore, a person in Litton's position would have no reason to believe, under the clearly established law of this Circuit, that acting to remove Steinburg from the podium in order to ensure the orderly conduct of the meeting would constitute a violation of Steinburg's free speech rights. As Judge Phillips noted:

> It is hard to imagine circumstances in which the tolerance commanded by the immunity doctrine for possible mistakes of judgment by public

> officials is more appropriate and necessary than those confronted by officials presiding over potentially explosive public hearings. Typically untrained and inexperienced in the difficult business of presiding and applying rules of order in fast-moving situations of tense political controversy, such officials are particularly fit subjects for the protections afforded by qualified immunity doctrine. Someone, after all, has to perform these necessary functions. The policies that underlie immunity doctrine will not be served by holding such persons to too exacting standards of calm and prescience in avoiding unintended violations of their fellow citizens' speech rights in this context.

Id. No doubt, Litton might have been more deft in controlling the meeting, and might have prevented the situation from escalating as it did, but Litton's actions to control the meeting were reasonable, and he would find protection from the qualified immunity doctrine were he to be sued in his individual capacity for imposing an unreasonable time, place, and manner restriction on Steinburg's speech. Therefore, an individual capacity suit against Litton would not survive summary judgment under any legal theory, and Steinburg's motion to amend with respect to Litton must be denied.

## III. Conclusion

Without question, this incident was ugly, and both Litton and Gecker could have handled the situation differently; however, their actions did not cause Steinburg constitutional injury, and, therefore,

individual capacity suits against them would be futile. For that reason, and because the motion to add Prof ita as a defendant is untimely under the Court's Scheduling Order, Steinburg's Motion to Amend Complaint and to Add New Party Defendant (Docket No. 38) is denied.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

Robert E. Payne
United States District Judge
Richmond, Virginia Date: February 1, 2007

Footnote

fn1 While the style of Steinburg's complaint indicates only an official capacity suit against Litton and Gecker, the body of the complaint offers some evidence that Steinburg intended to sue Litton and Gecker in their individual capacities, and the parties themselves seemed to treat this as an individual capacity suit. However, during a conference call on September 21, 2006, Steinburg's counsel answered in the affirmative when the Court asked him directly if this was an official capacity suit rather than an individual capacity suit. (See Pl.'s Mem. in Supp. of Mot. to Amend Compl. at 2.) Because, at the time, Steinburg's counsel held fully understood the legal implications of his response, the Court has treated this as an official capacity suit, in keeping with the reasoning of Atchinson v. District of Columbia, 73 F.3d 418, 424-28 (D.C. Cir. 1996).

fn2 Under the Commission's Suggested Practices and Procedures, a request for deferral is to be made in writing at least three days before the meeting. (See Aff. of Linda Lewis, Ex. B at 2.) For reasons neither explained nor readily apparent, this procedure was not followed. The failure to follow the prescribed protocol is mentioned in Steinburg's papers but the failure is not a component of his claim. (See Mem. in Supp. of Pl.'s Mot. for Partial Summ. J. at 5.)

fn3 Profita entered the hearing room after Commission Member Kirk Turner pressed a panic button sometime during the exchange between Steinburg and Litton. (See Turner Dep. 91:23-92:10, Oct. 5, 2006; Profita Dep. 7:24-8:4, Oct. 5, 2006.) Turner thought the meeting was "out of control" at that point (Turner Dep. 92:5.)

fn4 A limited public forum exists when the "government creates a channel for a specific or limited type of expression where one did not previously exist." Child Evangelism Fellowship, 457 F.3d at 382. Here, the Commission, established under Virginia law, conducts monthly public meetings that include opportunities for public comment on land use issues. These public comment periods are limited public fora. See Bach, 139 F. Supp. 2d at 741 (finding public school board meetings that invite public comment to be limited public fora).

fn5 Steinburg does not argue that his First Amendment rights were violated even if the motivation for silencing Steinburg was viewpoint-neutral. In other words, Steinburg does not argue that the time, place, and manner restrictions cited by the Defendants were unreasonable.

fn6 The Court also reaches this conclusion in a separate Memorandum Opinion granting the Commission's Renewed Motion for Summary Judgment (Doc. No. 28).

fn7 Gecker indicated his frustration with the previous speakers at least twice before Steinburg came to the podium: first, when he interrupted the second speaker to ask whether or not he was in favor of the deferral (a not-so-subtle reminder to stay on topic); and second, after he recalled Shewmake to the podium, when he pointedly noted that the first two speakers had failed to address the deferral and had discussed their safety related concerns instead.

fn8 Steinburg does not argue that Gecker was not allowed, under the First Amendment or otherwise, to respond to Steinburg's criticism.

fn9 Steinburg cites Musso v. Hourigan, 836 F.2d 736 (2nd Cir. 1988), to argue that Gecker may be held liable for silencing Steinburg even though Gecker was not formally empowered to call a speaker out of order. The Court agrees that, under certain circumstances, someone lacking the formal authority to deprive someone of their constitutional rights can still be held accountable for a deprivation under 42 U.S.C. § 1983. However, the facts in Musso are very different from the facts here. In Musso, a school board member who was not formally empowered to silence speakers nonetheless called a speaker out of order and directed a staff member to call the police for the purpose of placing the speaker under arrest. 836 F.2d at 739. Because that school board member took formal steps to silence the speaker, the Second Circuit determined that

he could be liable for his actions under 42 U.S.C. 1983. Id. at 742. In this case, on the other hand, Gecker took no steps to silence Steinburg. He simply argued with him.

fn10 Gecker also claims qualified immunity from individual suit, but it is unnecessary to invoke that defense or do a lengthy analysis of it. A public official being sued for public acts is entitled to qualified immunity unless a reasonable person in his position would have known that his actions were violating an individual's clearly established constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, a qualified immunity analysis has two steps: first, a court must determine whether a constitutional right had been violated on the facts alleged; second, a court must determine whether that constitutional right was clearly established at the time the alleged violation occurred. Saucier v. Katz, 533 U.S. 194, 200 (2001). Here, Gecker did not violate Steinburg's constitutional rights on the facts presented by this record.

fn11 As discussed above with respect to Gecker, the first step of a qualified immunity analysis is to determine whether an injury occurred; here, because Litton was not motivated by viewpoint discrimination in stifling Steinburg's speech, and therefore caused no constitutional injury, Litton would be entitled to qualified immunity.

Filed 6/24/08
No. 07-1181
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT C. STEINBURG,
Plaintiff-Appellant,

v.

CHESTERFIELD COUNTY PLANNING COMMISSION; DANIEL A. GECKER, in his official capacity; SHERMAN W. LITTON, in his official capacity,
Defendants-Appellees.

ORDER

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk

109

No. 08-389

Supreme Court, U.S.
FILED
OCT 22 2008
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

ROBERT C. STEINBURG,

*Petitioner,*

vs.

CHESTERFIELD COUNTY PLANNING COMMISSION; DANIEL A. GECKER, In His Official Capacity; SHERMAN W. LITTON, In His Official Capacity,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF IN OPPOSITION

STEVEN L. MICAS*
Chesterfield County Attorney
JEFFREY L. MINCKS
Deputy County Attorney
STYLIAN P. PARTHEMOS
Senior Assistant County Attorney
9901 Lori Road, Suite 503
Post Office Box 40
Chesterfield, Virginia 23832
Telephone: (804) 748-1491
Facsimile: (804) 717-6297

*Counsel of Record* *Counsel for Respondents*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii
SUMMARY OF CASE ..... 1
STATEMENT OF FACTS ..... 5
MATERIAL PROCEEDINGS ..... 9
LEGAL ARGUMENT ..... 11
CONCLUSION ..... 16

# TABLE OF AUTHORITIES

Page

## FEDERAL CASES

*City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976)...3, 5, 7, 14, 16

*Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985).....4, 13, 16

*Eichenlaub v. Twp. of Indiana*, 385 F.3d 274 (3d Cir. 2004).....16

*Good News Club v. Milford Central School*, 533 U.S. 98 (2001).....4, 13, 16

*Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989).....16

*Lamb's Chapel v. Center Moriches Union Free Sch. District*, 508 U.S. 384 (1993).....15

*Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983).....15

*Rosenberger v. Rector and Board of Visitors of the University of Virginia*, 515 U.S. 819 (1995).....4, 13, 16

*Smith v. Cleburn County Hospital*, 870 F.2d 1375 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989).....16

*Walters v. City of St. Louis*, 347 U.S. 231 (1954).....13

## DOCKETED CASES

*Bannon v. School District of Palm Beach County*, No. 04-1207.....15

*Lee v. York County School Division*, No. 07-140.....15

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

107 Dick. L. Rev. 639, 657 (2003).....4

## BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondents, Chesterfield County Planning Commission, Sherman W. Litton and Daniel Gecker, by counsel, respectfully request the Court to deny the petition of Robert Steinburg for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on May 29, 2008.

## SUMMARY OF CASE

The Chesterfield County Planning Commission is a public body appointed by the Chesterfield County Board of Supervisors to advise the Board on zoning matters. The Planning Commission's October 18, 2005 meeting agenda included a request to defer a public hearing on an application to amend a previously granted zoning case. The Commission took public comment on that deferral request. Steinburg spoke during that comment period, but when he repeatedly refused to address the deferral, Litton, the Chairman of the Commission, told Steinburg to leave the podium and be seated.[1] When Steinburg continued

[1] The entire comment period and Steinburg's removal are captured on the official videotape of the Commission's meeting and the proceedings have been transcribed. Both the videotape and the transcript are part of the record.

to refuse to speak to the deferral issue or be seated, he was ultimately removed from the podium.

Having viewed the videotape of the meeting, the District Court concluded that "a reasonable jury could not determine that Litton silenced Steinburg to stifle his viewpoint rather than to restore order to the meeting by focusing discussion on the deferral." The Court of Appeals likewise concluded from the videotape that "Steinburg was excluded from the public meeting because of his refusal to address the topic for which the meeting was opened and because of his disruptive manner, and not because of any viewpoint he expressed."

Throughout this litigation, both Steinburg and the county officials agreed that the following principles applied to this case:

1. Steinburg was speaking in a limited public forum which the Planning Commission had properly limited to the topic of a zoning deferral;

2. All members of the public were permitted to speak on the topic of the deferral, irrespective of their viewpoint; and

3. Any effort on the part of the Commission to prohibit any speaker from expressing a viewpoint on the subject of the limited public forum would have been impermissible under the First Amendment.

As the Court of Appeals succinctly stated:

> "In this case the parties agree that the Commission's public meeting was a 'limited public forum,' and we concur in that assessment. Accordingly, a government entity such as the Commission is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business. But any restriction must not discriminate on the basis of a speaker's viewpoint."

(Petition for Writ of Certiorari ("Pet.") 15a). *City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176, n.8 (1976).

In the face of the factual and legal simplicity of this case, Steinburg asks this Court to grant certiorari because, he claims, First Amendment law is "unsettled." At various times in his Petition, Steinburg asserts that issues exist in this case about whether a limited public forum is distinct from a designated public forum, whether it is a type of public forum or a type of non-public forum, what level of scrutiny is appropriate to determine the constitutional reasonableness of the limitations imposed on the forum and what level of scrutiny is appropriate to judge content-based restrictions on speech. Whether the federal courts, in reality are, as Steinburg contends, "dazed and confused" on these questions is irrelevant to this appeal. These hypothetical questions have nothing

to do with this case and were never raised by Steinburg below.[2] These questions might be relevant in cases outside the public meeting context where a limited public forum is opened for general public speech and certain topics are then excluded from discussion by the government.[3] However, they have no relevance in public meetings with fixed agendas limited to specific topics. This Court decided more than 30 years ago that limitations of the forum to a

---

[2] Even the "dazed and confused" quote which appears in a Dickinson College law review comment is misused in Steinburg's Petition. "Dazed and confused" is used by the student author to discuss whether or not the "limited public forum" and "designated public forum" middle ground between traditional public fora and non-public fora consist of a single category or two separate ones. "Despite the acceptance of a middle ground between the traditional public forum and the nonpublic forum, the courts have become hopelessly 'dazed and confused' over whether this middle ground consists of one or two categories, and, if the latter, how they relate to one another." *See* 107 Dick. L. Rev. 639, 657 (2003). Since the parties agreed, from the inception of this case, that Steinburg was speaking in a "limited public forum" for the discussion of a zoning deferral only, no one has been "dazed" about the nature of the forum in which Steinburg spoke or "confused" about the constitutional standards that apply to restricting speech within that forum.

[3] *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985) (politically active groups excluded from participating in government employees charity drive); *Rosenberger v. Rector and Board of Visitors of the University of Virginia*, 515 U.S. 819 (1995) (religious groups excluded from receiving University's student fees available to all other student groups); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (religious club denied access to school facilities that were available to all other clubs).

single topic of public business is *per se* permissible. *City of Madison, supra.*

## STATEMENT OF FACTS

Chesterfield County, Virginia is a political subdivision of the Commonwealth of Virginia located immediately south of the City of Richmond. The County is composed of 446 square miles and has a population of approximately 310,000. The County is governed by a five-member Board of Supervisors elected to four-year terms. The Chesterfield County Planning Commission is a public body appointed by the Board of Supervisors to give the Board advice on land use matters. The Commission considers zoning matters for which public comment is permitted including requests by zoning applicants to defer to a later date scheduled public hearings on zoning applications. (A. 53, 71).

When the Planning Commission held a regular monthly meeting on October 18, 2005, one of the items on its agenda was a request to defer for 30 days the public hearing on a rezoning application for a residential development known as "Tarrington". (Court of Appeals Appendix ("A.") 69-79). The application sought to amend a zoning condition to allow garages in Tarrington to face toward the street rather than to the side. (A. 75). The Chairman of the Commission, Sherman Litton, invited members of the public to speak on the issue of whether or not the

deferral request should be granted. (A. 80 (Videotape); A. 81). The videotape and a verbatim transcript are part of the record and are undisputed. (A. 80 (Videotape), Petition ("Pet.") 6a-11a).

The first speaker expressed support for the deferral throughout her presentation while including comments about mine safety issues as well. (Pet. 31a). (Tarrington is located in the vicinity of historic coal mines) The second speaker also expressed support for the deferral but also addressed mine safety. (Pet. 31a-32c). During his comments the second speaker was twice prompted to address the deferral and both times he did so. (Pet. 31a-32a).

Steinburg spoke third. Steinburg spoke for more than a minute and one-half without ever mentioning the deferral request. (Pet. 6a-7a). Steinburg then directed a comment to Commissioner Gecker, complaining that Gecker had been talking during the comment period to another Commission member (Pet. 7a).[4] Gecker informed Steinburg that he was "not going to listen to what you have got to say on a deferral motion when you come up and speak to something other than the deferral." (Pet. 8a). Rather than speak

---

[4] During a prior speaker's comments Gecker had spoken with a fellow Commission member, Russ Gulley, who was sick and wanted to leave the meeting room. Gulley had asked Gecker (who was more familiar with the Tarrington case than Gulley since the property at issue was located in Gecker's district) whether he (Gulley) needed to stay and listen to the discussion on the deferral or whether he could leave. (A. 584).

to the deferral when prompted to do so, as the prior speaker had done, Steinburg shouted, "Mr. Gecker would you please give me the right to speak, who do you think you are?" (Pet. 8a).[5] Litton, as Chairman, then intervened:

> CHAIRMAN LITTON: I'm going to cut you off.[6] I'm Chairman, I can cut –
>
> STEINBURG: Mr. Litton, yes you can, you can do that.
>
> CHAIRMAN LITTON: And I am. This has gone way past. I've given you the courtesy. This is nothing but a deferral. This has nothing to do with the case. So just please sit down. (Pet. 8a).

---

[5] Contrary to Steinburg's contention that Gecker's comment "chilled and intimidated" his "speech" and was "the equivalent of telling him to stop speaking" (Pet. 36-7), Steinburg continued to speak (and, at times, to shout) for well over a minute thereafter. He resolutely refused, however, to speak to the only topic which was before the limited forum. (Pet. 9a-10a).

[6] Steinburg conveniently terminates the verbatim transcript at this point in his Petition with an ellipsis: "I'm going to cut it [sic] off . . . " (Pet. 8). Steinburg eliminates the rest of the transcript in order to hide the fact that Litton's explanation is consistent with the constitutional standards applicable to confining speech to the topic being considered in a limited public forum. *City of Madison*, 429 U.S. at 176, n.8. In the portion of the transcript omitted by Steinburg, Litton explains that he cut off Steinburg because "[t]his is nothing but a deferral. This has nothing to do with the case," and "[b]ecause it's strictly a deferral, and we're not arguing the case tonight." (Pet. 8a-9a).

Steinburg responded, "I am *not* sitting down. I am not done talking yet." Litton responded that he had "heard enough on this case tonight" and was going to cut off Steinburg's comments. (Pet. 8a-9a).

Steinburg then asked Litton, "Can you tell me why you are cutting it off?" Litton reiterated: "Because it is strictly a deferral and we're not arguing the case tonight, the case will be discussed at some time, at a later time." Litton then made one last attempt to get Steinburg to speak to the deferral: "If you are telling me that you are in favor of the deferral that is all I need to know. If you don't want the deferral, then you can argue . . . " (Pet. 9a). Steinburg once again interrupted Litton at this point saying, "You don't want any background information on anything." But even after this third attempt by Litton to get Steinburg to speak to the deferral Steinburg still would not tell the Commission whether he supported or opposed the deferral. (A. 80 (Videotape), Pet. 9a-10a).

When it became apparent to Litton that Steinburg would not address the deferral, Litton told Steinburg, "I am asking you just to sit down, please."[7]

---

[7] Litton's deposition testimony confirmed his contemporaneous explanation to Steinburg at the October 18 meeting that he asked Steinburg to be seated only because Steinburg would not discuss the deferral: "I had give [sic] him several minutes there to speak, and in no words did he talk about the deferral." (A. 465). Litton further testified that he "[l]et him go for several minutes without him mentioning the word deferral in any way or anyhow, hoping he would get to a word 'deferral' saying something like the other ones did." (A. 466). "He [Steinburg] had

(Continued on following page)

Steinburg responded: "I know you are. I understand what you are doing. And when I am through speaking, I will sit down." In response, Litton told Steinburg, "No, I think you are going to sit down now." When Steinburg responded, "I am not," Litton requested the assistance of a Chesterfield County police officer in removing Steinburg from the podium because he would neither speak to the matter before the Planning Commission nor sit down. (Pet. 9a-10a).

## MATERIAL PROCEEDINGS

Steinburg filed his Complaint in the District Court on April 12, 2006. On May 31, 2006, the Commission, Litton and Gecker filed a Motion for Summary Judgment. Recognizing the conclusive nature of the videotape, Steinburg also filed a Cross-motion for Partial Summary Judgment on May 31, 2006. The District Court then permitted Steinburg to conduct discovery. At the conclusion of discovery Steinburg moved to add the police officer who removed him from the Commission meeting as a defendant and to add Litton and Gecker as defendants in their individual capacities.[8]

---

been up for I don't know how long, three or four minutes, and hadn't discussed the deferral in no way." (A. 467). "The only objectionable object [sic] was that he hadn't discussed the deferral in any way." (A. 469).

[8] Up to that time, Litton and Gecker had been sued in their official capacity only.

The District Court found that the videotape established that Steinburg was removed from the podium for failing to address the topic of the public hearing, not because of any viewpoint which he had expressed during the meeting. Accordingly, the District Court granted summary judgment to the Commission and to Litton and Gecker in their official capacity. The District Court also denied Steinburg's motion to add the police officer as a defendant and to add Litton and Gecker as defendants in their individual capacity since the Court's finding that Steinburg was not subjected to viewpoint discrimination rendered Steinburg's claims against the additional parties futile.

Steinburg appealed the District Court's rulings to the United States Court of Appeals for the Fourth Circuit. On May 29, 2008, the Court of Appeals issued its opinion affirming the judgment of the District Court. Steinburg then sought a rehearing en banc. The rehearing petition was circulated to all Judges of the Fourth Circuit. None of the Judges even requested that a poll be taken to determine whether any Judge thought that a rehearing was appropriate. Accordingly, the Court of Appeals denied the rehearing request.

Steinburg then filed this Petition.

## LEGAL ARGUMENT

The videotape of the October 18, 2005 Planning Commission meeting shows that Litton terminated Steinburg's participation in the public comment period only after Steinburg repeatedly rejected Litton's invitation to speak to the deferral. The District Court found that the videotape conclusively established that Steinburg was not removed from the podium because of improper viewpoint discrimination. He was removed because he disrupted the Planning Commission meeting when he refused to address the only topic of the public hearing: whether or not to defer the zoning case:

> " . . . in light of all the possible inferences that could be drawn from Litton's conduct, the Court concludes that a reasonable jury could not determine that Litton silenced Steinburg to stifle his viewpoint rather than to restore order to the meeting by focusing discussion on the deferral."

(Pet. 70a-71a).

The Court of Appeals affirmed the District Court's ruling, holding that:

> "We agree with the district court that Steinburg was excluded from the public meeting because of his refusal to address the topic for which the meeting was opened and because of his disruptive manner, and not because of any viewpoint he expressed."

(Pet. 3a).

In his Petition, Steinburg skirts the express factual holdings of both the District Court and the Court of Appeals that Steinburg was not subjected to either a content-based restriction or viewpoint discrimination. Steinburg's attempt to couch this appeal as an effort to resolve a conflict between the federal circuit courts on the standard for reviewing governmental viewpoint discrimination is misguided because any such "conflict" is unrelated to his own case. His appeal is instead nothing more than an attempt to appeal the factual determination of two lower courts; that no viewpoint discrimination occurred. The rules of this Court expressly provide that appeals in such cases are "rarely granted." Rule 10, Rules of the Supreme Court.[9]

The irrelevance of Steinburg's "legal conflict" claim is underlined by his discussion of the standard

---

[9] Steinburg's attempt to resurrect a facial challenge to the "personal attacks" policy is also misplaced. The facial challenge was rendered moot when the policy was repealed by the Commission while this case was pending before the District Court and accordingly, the District Court made no decision concerning the facial validity of the policy. (Pet. 46a, n.6). Moreover, since both the District Court and Court of Appeals found that there was no evidence that Chairman Litton invoked the policy when he asked Steinburg to be seated, an "as applied" challenge to the policy was also unavailable. (Pet. 23a, 43a). The Court of Appeals discussed the policy and found it to be content-neutral and not facially unconstitutional but ultimately concluded that the policy was not relevant to this case, agreeing with the District Court that the "evidence is insufficient to prove that Steinburg was silenced because of the policy." (Pet. 23a).

of review in *Good News Club*, *Cornelius*, and *Rosenberger*, *supra*. (Pet. 23). Those three cases each dealt with the issue of the standard of review for determining when it is constitutionally permissible to exclude, because of the content of their speech, individuals or groups who would otherwise be within the class of speakers permitted in a limited public forum. That standard of review is irrelevant where, as here, no viewpoint discrimination occurred in the first place and the speaker was excluded from the forum solely because he failed to address the specific topic for which the forum had been opened.

The issue of the standard of review for content-based restrictions imposed by government is also an inappropriate issue for appeal in this case for procedural reasons. Steinburg has never previously raised it in this litigation and, therefore, cannot raise it now. *Walters v. City of St. Louis*, 347 U.S. 231, 233 (1954) (the Court "will not undertake to review what the court below did not decide"). On page 10 of his Petition Steinburg contends that he raised the issues he raises now on page 32 of his Opening Brief to the Court of Appeals. However, a review of page 32 of his Opening Brief proves that his claim is inaccurate. On page 32, Steinburg argued about the standard of review only:

> If the government excludes a speaker who falls within the class to which a limited or designated public forum is made generally available . . .

The District Court found in this case that Steinburg did not fall within the class to which the limited public forum was generally available. That finding, which was affirmed by the Court of Appeals, makes a determination of the proper standard of review irrelevant in this case.[10]

Even Steinburg to this point has never disputed that "[p]lainly, public bodies may confine their meeting to a specified subject matter." *City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176 n.8 (1976). As Steinburg stated on p. 31 of his Opening Brief to the Court of Appeals:

> "When a state establishes a limited public forum, as in this case, the state is not required to and does not allow persons to engage in every type of speech and may be justified in reserving its forum for certain groups or for the discussion of certain topics, *but the restriction must not discriminate against speech on the basis of content or viewpoint*, and must be reasonable in light of the purpose served by the forum." (emphasis in original).

---

[10] The irrelevance of Steinburg's "standard of review" argument is confirmed by the fact that the passage cited by Steinburg from page 32 of his Opening Brief to the Court of Appeals was not part of any claim concerning what "standard of review" to apply but, instead, was part of his now twice-rejected claim that there are "material" factual disputes as to whether Steinburg had been subjected to viewpoint discrimination.

*See also* Steinburg's Opening Brief to the Court of Appeals at pp. 24-25:

> "The First Amendment allows the public body to adopt and enforce procedures that limit public comments to specific topics within the public body's jurisdiction or which are before the public body at the time the public speaks. . . . Content-related regulation is constitutionally appropriate in a limited public forum if the limitations placed on content fall within the scope of the designation, and if the regulation is neutral as to viewpoint within the subject matter of the content."

The Rutherford Institute, who is co-counsel for Steinburg in this appeal, has likewise recognized that the law prohibiting viewpoint discrimination is settled and beyond legitimate dispute: "[I]t is fundamental First Amendment jurisprudence that there can be no viewpoint discrimination." (citing *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37 (1983), *Rosenberger*, and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), Petition for Writ of Certiorari filed in *Lee v. York County School Division*, No. 07-140 (2007 WL2261604 (U.S.) at 18 (July 31, 2007)). "Viewpoint discrimination is clearly a violation of the First Amendment when it occurs in a public forum." Petition for Writ of Certiorari filed in *Bannon v. School District of Palm Beach County*, No. 04-1207 (2005 WL562199 (U.S.) at 11 (March 7, 2005)).

While subject matter restrictions such as the ones imposed in *Cornelius*, *Rosenberger*, and *Good News* must be scrutinized under some standard of review, they are per se permissible in the context of public meetings called to discuss specific topics of public business, pursuant to this Court's ruling in *City of Madison*. The only standard of review necessary is the standard which both the District Court and Court of Appeals applied in this case: to determine whether an individual speaker was excluded from the forum for failing to address the topic of the public hearing, which is constitutionally permissible, or whether the speaker was excluded because of the viewpoint he was expressing on the topic of the public hearing, which is not constitutionally permissible. *City of Madison* at 176. Both parties to this litigation recognized that this was the standard of review in this case. No federal court has held otherwise. *See, e.g., Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004); *Smith v. Cleburn County Hosp.*, 870 F.2d 1375, 1383 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989); *Jones v. Heyman*, 888 F.2d 1328, 1332 (11th Cir. 1989).

## CONCLUSION

In the two and one-half years that this case has been pending, three facts have remained constant: (1) no party has disputed that Steinburg was speaking in a limited public forum; (2) both parties have agreed that the First Amendment prohibits content-based or

viewpoint discrimination against a speaker in a limited public forum; and (3) neither party has maintained, briefed or argued that the law governing this case is unsettled, conflicting or even confusing.

The facts in this case are on videotape. The tape shows a speaker who refuses to discuss the 30-day deferral which was the only topic of the public forum, and who is removed from the public hearing only after he refuses legitimate requests that he discuss the deferral. This case has nothing to do with the "conflict" which Steinburg asserts has left the courts "dazed and confused." Whether this "conflict" is real or illusory is immaterial to this case and, therefore, this case is not an appropriate vehicle to engage in such an academic discussion.

Respectfully submitted,

STEVEN L. MICAS*
Chesterfield County Attorney
JEFFREY L. MINCKS
Deputy County Attorney
STYLIAN P. PARTHEMOS
Senior Assistant County Attorney
9901 Lori Road, Suite 503
Post Office Box 40
Chesterfield, Virginia 23832
Telephone: (804) 748-1491
Facsimile: (804) 717-6297

**Counsel of Record* *Counsel for Respondents*